( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No.

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
AND AS ADMINISTRATRIX, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Proceedings in United States circuit court of appeals, fifth circuit	a	1
Caption (omitted in printing)	a	
Record from district court of the United States, Southern District of Florida	1	1
Caption	1	1
Amended declaration, case No. 2730	3	2
Plea, case No. 2730	14	10
Amended declaration, case No. 2731	15	11
Plea, case No. 2731	25	19
Amended declaration, case No. 2732	26	19
Plea, case No. 2732	36	27
Amended declaration, case No. 2733	37	28
Plea, case No. 2733	47	35
Amended declaration, case No. 2734	48	36
Plea, case No. 2734	59	44
Verdicts	60	45
Final judgments	61	46
Order extending time and term of court for purpose of filing bill of exceptions	65	49
Order permitting appeal forma pauperis	67	50
Petition for appeal	69	50

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 17, 1933

	Original	Print
Order allowing appeal	71	51
Assignment of errors	73	51
Bill of exceptions	76	53
Caption	77	53
Order consolidating causes	77	54
Testimony of Sarah Elizabeth Stringfellow	77	54
Dr. J. A. Mese	79	56
Mary Mildred Smith	80	56
J. E. Bergert	82	58
Harry Lishness	82	58
George Smart	84	60
Mrs. Crystal Towne	86	61
C. W. Cleary	87	62
Offer in evidence—Mortality tables	88	63
Testimony of W. D. Gillen	88	63
H. O. Bassett	89	64
A. R. White	92	67
Mabel R. Seeley	95	69
O. C. Howell	101	74
E. H. Baldwin	105	78
Roy Outing	106	79
J. O. Hill	108	80
C. A. Windham	110	81
J. O. Hill (recalled)	111	82
J. T. Hodges	112	83
W. T. McIlvaine	113	84
Mrs. George Smart	115	86
Harry Lishness (recalled)	116	86
W. H. James	116	87
Mrs. Crystal Towne (recalled)	117	87
Defendant's motion for directed verdict	118	88
Ruling on motion for directed verdict	118	88
Order approving bill of exceptions	121	91
Order to transmit photographic exhibits	123	91
Citation and service (omitted in printing)	125	
Præcipe and acknowledgment of service thereon	129	92
Clerk's certificate (omitted in printing)	131	
Exhibits—Photographs	131a	92
Argument and submission (omitted in printing)	132	
Opinion, Bryan, J.	133	93
Separate opinion, Hutcheson, J.	139	98
Judgment	148	104
Motion of appellant for severance	149	104
Petition of appellant for rehearing	153	106
Petition of appellee for rehearing	157	109
Opposition of appellee to motion for severance	164	114
Order granting motion of appellant for severance	166	115
Order denying petition for rehearing of appellant	167	116
Order denying petition for rehearing of appellee	168	116
Motion of appellant and order staying mandate	169	116
Motion of appellee and order staying mandate	172	118
Clerk's certificate (omitted in printing)	175	
Order allowing certiorari		121

[fols. a-d] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION

No. 2730

SARAH ELIZABETH STRINGFELLOW, as Administratrix of the Estate of Hazel Stringfellow, Deceased, Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Defendant

No. 2731

SARAH ELIZABETH STRINGFELLOW, a Widow, Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Defendant

No. 2732

SARAH ELIZABETH STRINGFELLOW, a Widow, Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Defendant

[fol. 2]

No. 2733

SARAH ELIZABETH STRINGFELLOW, a Widow, Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Defendant

No. 2734

SARAH ELIZABETH STRINGFELLOW, as Administratrix of the Estate of Jack H. Stringfellow, Deceased, Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Defendant

Cases Nos. 2731, 2732, 2733 and 2734 were consolidated for trial with Case No. 2730, by order of the District Court, on February 2, 1932.

[fol. 3] IN UNITED STATES DISTRICT COURT

No. 2730

[Title omitted]

Civil Action. Damages: $15,000.00

AMENDED DECLARATION: FILED MAY 25, 1931

Plaintiff, Sarah Elizabeth Stringfellow, as administratrix of the estate of Hazel Stringfellow, deceased, by her attorneys Campbell & McLean, sues the Atlantic Coast Line Railroad Company, a corporation who has summoned to answer the plaintiff in a civil action for damages.

First Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the defendant, Atlantic Coast Line Railroad, Company, is a corporation chartered under the laws of the state of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passenters and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is [fol. 4] a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Hazel Stringfellow was riding in an

automobile which was being driven by her father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross, and that at the said time and place the defendant Railroad Company, carelessly and negligently propelled and ran its train, against and upon the said automobile in which said deceased was riding aforesaid, and upon said Hazel Stringfellow, deceased, with great force and violence, whereby deceased was then and there, by said negligence and carelessness of the defendant, killed; and that said Hazel Stringfellow died leaving neither husband nor minor child or children, nor person or persons dependent upon her, the said Hazel Stringfellow, for support; that the said Sarah Elizabeth Stringfellow, plaintiff, was on, to-wit: March 25th, 1931, duly appointed as administratrix of the estate of the said Hazel Stringfellow, deceased; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant the pecuniary value of the prospective earnings and savings that the said deceased could reasonably have expected but for the death of said deceased, to the damage of the plaintiff in the sum of $15,000.00.

[fol. 5] Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $15,000.00.

Second Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running North and South, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day [fol. 6] of March, 1931, at about the hour of six o'clock, P. M., the said Hazel Stringfellow was riding in an automobile which was being driven by her father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street, where the railroad tracks of the defendant Company and said Scotland Street intersect and cross, and that at said time and place the said Hazel Stringfellow was struck and killed by said Railroad Company's north bound passenger train No. 132, and that no alarm or warning of any kind was given of the approach of said train either by the ringing of its bell or the blowing of its whistle and said train was being run at a high and dangerous rate of speed and the plaintiff alleges that the speed of said train and the failure of the defendant to give warning of its approach either by the blowing of the whistle or the ringing of the bell at the time, place and under the circumstances, was negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Hazel Stringfellow was killed; and that said Hazel Stringfellow died leaving neither husband nor minor child or children, nor any person or persons dependent upon her, the said Hazel Stringfellow, for a support; that the said Sarah Elizabeth Stringfellow, plaintiff, was on, to-wit: March 25, 1931, duly appointed as administratrix of the estate of the said Hazel Stringfellow, deceased; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant the pecuniary value of the prospective earnings and savings

that the said deceased could reasonably have expected but for the death of said deceased, to the damage of the plaintiff in the sum of $15,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $15,000.00.

[fol. 7] Third Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said Railroad tracks; that on the 9th of March, 1931, at about the hour of six o'clock, P. M., the said Hazel Stringfellow was riding in an automobile which was being driven by her father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant

Company and said Scotland Street intersect and cross and that at said time and place the said Hazel Stringfellow was killed by said Railroad Company's north bound passenger [fol. 8] train No. 132, said train being run at a high rate of speed over said Scotland Street, crossing, and that if warning signals were given by said train, the speed of said train rendered such warning signals unavailing and useless to one approaching said crossing in an easterly direction along said street as the view of the tracks of said railroad were so obstructed as to render the approach to said tracks dangerous, which fact was known to said defendant or could have been known by it in the exercise of reasonable diligence, and the plaintiff alleges that the speed of said train at the time, place and under the circumstances constituted negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Hazel Stringfellow was killed; and that said Hazel Stringfellow died leaving neither husband nor minor child or children, nor any person or persons dependent upon her, the said Hazel Stringfellow, for a support; that the said Sarah Elizabeth Stringfellow, plaintiff, was on, to-wit: March 25th, 1931, duly appointed as Administratrix of the estate of the said Hazel Stringfellow, deceased; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant the pecuniary value of the prospective earnings and savings that the said deceased could reasonably have expected but for the death of said deceased, to the damage of the plaintiff in the sum of $15,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $15,000.00.

Fourth Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, [fol. 9] tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jack-

sonville, Florida, and running in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those traveling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said city, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Hazel Stringfellow was riding in an automobile which was being driven by her father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Hazel Stringfellow was killed by said Railroad company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing; that at the time aforesaid there was a strong wind blowing from the northwest which was known to said defendant, or could have been known to a person in possession of his ordinary faculties and the sound of the approaching train and warnings of its approach, if any, were obstructed by the wind to one approaching said crossing while travelling [fol. 10] in an easterly direction along said street and that in approaching said railroad tracks in an easterly direction along said Scotland Street, intervening objects prevent the view of an approaching train from the south until within a few feet of the tracks of said railroad, and that at said time and place the said defendant failed to exercise such care, prudence and caution as the circumstances of said crossing reasonably demanded of it in that said train

approached and passed over said crossing at a high rate of speed and failed to give suitable and proper warning of its approach and that it was the duty of said defendant to warn by appropriate signals all persons who may have been upon said Scotland Street of the approach of said train, and the said defendant failed to use such ordinary precaution as the exergencies of the circumstances required, to warn all persons who might have been upon said Scotland Street near said railroad crossing and that the failure of said defendant to observe this duty which it owed to the public in general and to the said deceased, was negligence and such failure was the proximate cause of the injury and death of the said Hazel Stringfellow. And the plaintiff avers that by reason of said negligence of the defendant the said Hazel Stringfellow was killed; and that said Hazel Stringfellow died leaving neither husband nor minor child or children, nor any person or persons dependent upon her, the said Hazel Stringfellow, for a support; that the said Sarah Elizabeth Stringfellow, plaintiff, was on, to-wit: March 25th, 1931, duly appointed as administratrix of the estate of the said Hazel Stringfellow, deceased; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant the pecuniary value of the prospective earnings and savings that the deceased could reasonably have expected but for the death of said deceased, to the damage of the plaintiff in the sum of $15,000.00.

[fol. 11] Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $15,000.00.

Fifth Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through the incorporated City

of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Hazel Stringfellow was riding in an automobile which was being driven by her father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks — [fol. 12] defendant Company and said Scotland Street intersect and cross and that at said time and place the said Hazel Stringfellow was killed by said Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing; and plaintiff further avers that said defendant, Railroad Company, had been in the habit of, and had generally and customarily been, running said engine and train of cars in and through the incorporated City of Dunedin and over said crossing, at a high, reckless and dangerous rate of speed, in flagrant violation of the rights of persons who may have been upon said Scotland Street and the said defendant could reasonably have foreseen or contemplated that the running of said train in and through the said City of Dunedin and over and across said Scotland Street at an excessive rate of speed, considering the ordinary conditions of human activities in said City of Dunedin at said crossing, would probably result in an injury to persons lawfully upon said street, and that the excessive rate of speed of said train in and through said City of Dunedin

and over and across said Scotland Street at the time aforesaid, constituted negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Hazel Stringfellow was killed; and that said Hazel Stringfellow died leaving neither husband nor minor child or children, nor any person or persons dependent upon her, the said Hazel Stringfellow, for a support; that the said Sarah Elizabeth Stringfellow, plaintiff, was on, to-wit: March 25th, 1931, duly appointed as administratrix of the estate of the said Hazel Stringfellow, deceased, and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant the pecuniary value of the prospective earnings and savings that the said deceased could reasonably have expected but for the death of said deceased, to the damage of the plaintiff in the sum of $15,000.00.

[fol. 13] Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $15,000.00.

Campbell & McLean, by Wm. C. McLean, Attorneys for Plaintiff.

[fol. 14] IN UNITED STATES DISTRICT COURT

No. 2730-T

[Title omitted]

PLEA—Filed July 6, 1931

Now comes the Defendant, Atlantic Coast Line Railroad Company, a Corporation, in the above-entitled cause, by its undersigned attorneys, and for Plea to Plaintiff's Declaration, and each count thereof, filed in said cause, says:

1. That it is not guilty.

Jas. R. Bussey, Sam H. Mann, Jr., McKinney Barton, Attorneys for Defendant.

Duly sworn to by McKinney Barton. Jurat omitted in printing.

[fol. 15] IN UNITED STATES DISTRICT COURT

No. 2731

[Title omitted]

Civil Action. Damages: $25,000.00

AMENDED DECLARATION—Filed May 25, 1931

Plaintiff, Sarah Elizabeth Stringfellow, a widow by her attorneys, Campbell & McLean, sues the Atlantic Coast Line Railroad Company, a corporation, herein, who has been summoned to answer the plaintiff in a civil action for damages.

First Count.

Plaintiff is a resident of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased and the mother of Hazel Stringfellow, deceased, a minor child, whose father Guy Stringfellow is deceased, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns [fol. 16] and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and re-

crossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Hazel Stringfellow was riding in an automobile which was being driven by her father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross, and that at the said time and place the defendant Railroad Company, carelessly and negligently propelled and ran its train, against and upon the said automobile in which said deceased was riding aforesaid, and upon said Hazel Stringfellow, deceased, with great force and violence, whereby deceased was then and there, by said negligence and carelessness of the defendant killed; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant damages for the loss of [fol. 17] services of such minor child and also for the mental pain and suffering of plaintiff resulting from the injury and death of said minor child, to the damage of the plaintiff in the sum of $25,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $25,000.00.

Second Count

(1) Plaintiff is a resident of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased and the mother of Hazel Stringfellow, deceased, a minor child, whose father, Guy Stringfellow is deceased, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Rail-

road Company in and through the said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland street is used constantly and habitually by pedestrains and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said city and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Hazel Stringfellow was riding in an automobile which was [fol. 18] being driven by her father, Guy Stringfellow, along said Scotland street, going in an easterly direction at a point on said Scotland Street, where the railroad tracks of the defendant Company and said Scotland Street intersect and cross, and that at said time and place the said Hazel Stringfellow was struck and killed by said Railroad Company's north bound passenger train No. 132, and that no alarm or warning of any kind was given of the approach of said train either by the ringing of its bell or the blowing of its whistle and said train was being run at a high and dangerous rate of speed and the plaintiff alleges that the speed of said train and the failure of the defendant to give warning of its approach either by the blowing of the whistle or the ringing of the bell at the time, place and under the circumstances, was negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Hazel Stringfellow was killed; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant, damages for the loss of services of such minor child and also for the mental pain and suffering of plaintiff resulting from the injury and death of said minor child, to the damage of the plaintiff in the sum of $25,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $25,000.00.

Third Count

(1) Plaintiff is a resident of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the mother of Hazel Stringfellow, deceased, a minor child, whose father Guy Stringfellow is deceased, and the defendant, Atlantic Coast Line Railroad Company is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Peters- [fol. 19] burg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrains and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock, P. M., the said Hazel Stringfellow was riding in an automobile which was being driven by her father, Guy Stringfellow, along said Scotland Street, going in and easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Hazel Stringfellow was killed by said Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing, and that if warning signals were given by said train, the speed of said train rendered such warning signals unavailing and

useless to one approaching said crossing in an easterly direction along said street as the view of the tracks of said railroad were so obstructed as to render the approach to said tracks dangerous, which fact was known to said de-
[fol. 20] fendant or could have been known by it in the exercise of reasonable diligence, and the plaintiff alleges that the speed of said train at the time, place and under the circumstances constituted negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Hazel Stringfellow was killed; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant damages for the loss of services of such minor child and also for the mental pain and suffering of plaintiff resulting from the injury and death of said minor child, to the damage of the plaintiff in the sum of $25,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $25,000.00.

Fourth Count

(1) Plaintiff is a resident of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the mother of Hazel Stringfellow, deceased, a minor child, whose father Guy Stringfellow is deceased, and the defendant, Atlantic Coast Line Railroad Company is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Rail-
[fol. 21] road Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and

the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Hazel Stringfellow was riding in an automobile which was being driven by her father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street, where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Hazel Stringfellow was killed by the Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing; that at the time aforesaid there was a strong wind blowing from the northwest which was known to said defendant, or could have been known to a person in possession of his ordinary faculties and the sound of the approaching train and warnings of its approach, if any, were obstrueted by the wind to one approaching said crossing while travelling in an easterly direction along said street and that in approaching said railroad tracks in an easterly direction along said Scotland Street intervening objects prevent the view of an approaching train from the south until within a few feet of the tracks of said railroad, and that at said time and place the said defendant failed to exercise such care, prudence and caution as the circumstances of said crossing reasonably demanded of it in that said train approached and [fol. 22] passed over said crossing at a high rate of speed and failed to give suitable and proper warning of its approach and that it was the duty of said defendant to warn by appropriate signals all persons who may have been upon said Scotland Street of the approach of said train, and the said defendant failed to use such ordinary precaution as the exigencies of the circumstances required, to warn all persons who might have been upon said Scotland Street near said railroad crossing and that the failure of said defendant to observe this duty which it owed to the public in general and to the said deceased, was negligence and such

failure was the proximate cause of the injury and death of the said Hazel Stringfellow. And the plaintiff avers that by reason of said negligence of the defendant the said Hazel Stringfellow was killed; and the plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant damages for the loss of services of such minor child and also for the mental pain and suffering of plaintiff resulting from the injury and death of said minor child, to the damage of plaintiff in the sum of $25,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $25,000.00.

Fifth Count

(1) Plaintiff is a resident of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the mother of Hazel Stringfellow, deceased, a minor child, whose father Guy Stringfellow is deceased, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and oper- [fol. 23] ates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad company, running north and south, cross said street at right angles thereto; that said Scotland street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is

constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Hazel Stringfellow was riding in an automobile which was being driven by her father, Guy Stringfellow, along said Scotland Street, going in an easterly direction, at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Hazel Stringfellow was killed by said Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing; and plaintiff further avers that said defendant, Railroad Company had been in the habit of, and had generally and customarily been, running said engine and train of cars, in and through the incorporated City of Dunedin and over said crossing, at a high, reckless and dangerous rate of speed, in flagrant violation of the rights of persons who may have been upon said Scotland Street, and the said defendant [fol. 24] could reasonably have foreseen or contemplated that the running of said train in and through the said City of Dunedin and over and across said Scotland Street at an excessive rate of speed, considering the ordinary conditions of human activities in said City of Dunedin at said crossing, would probably result in an injury to persons lawfully upon said street and that the excessive rate of speed of said train in and through said City of Dunedin and over and across said Scotland Street at the time aforesaid, constituted negligence. And the plaintiff avers that by reason of said negligence, of the defendant, the said Hazel Stringfellow was killed; and the plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant damages for the loss of services of such minor child and also for the mental pain and suffering of plaintiff resulting from the injury and death of said minor child, to the damage of the plaintiff in the sum of $25,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $25,000.00.

Campbell & McLean, by Wm. C. McLean, Attorneys for Plaintiff.

[fol. 25] IN UNITED STATES DISTRICT COURT

No. 2731-T

[Title omitted]

PLEA—Filed July 6, 1931

Now comes the Defendant, Atlantic Coast Line Railroad Company, a Corporation, in the above-entitled cause, by its undersigned attorneys, and for Plea to the Plaintiff's declaration, and each Count thereof, filed in said cause, says:

1. That it is not guilty.

Jas. R. Bussey, Sam H. Mann, Jr., McKinney Barton, Attorneys for Defendant.

Duly sworn to by McKinney Barton. Jurat omitted in printing.

[fol. 26] IN UNITED STATES DISTRICT COURT

No. 2732

[Title omitted]

Civil Action. Damages: $25,000.00

AMENDED DECLARATION—Filed May 25, 1931

Plaintiff, Sarah Elizabeth Stringfellow, a widow, by her attorneys, Campbell & McLean, sues the Altantic Coast Line Railroad Company, a corporation, defendant herein, who has been summoned to answer the plaintiff in a civil action for damages.

First Count

(1) Plaintiff is a resident of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the mother of Jack H. Strngfellow, deceased, a minor child, whose father, Guy Stringfellow is deceased, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia,

and own and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. [fol. 27] Petersburg, Florida to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running North and south cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock, P. M., the said Jack H. Stringfellow was riding in an automobile which was being driven by his father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross, and that at the said time and place the defendant Railroad Company, carelessly and negligently propelled and ran its train, against and upon the said automobile in which said deceased was riding, aforesaid, and upon said Jack H. Stringfellow, deceased, with great force and violence, whereby deceased was then and there, by said negligence and carelessness of the defendant, fatally injured and from such injuries died on, to-wit: March 24th, 1931; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said [fol. 28] defendant damages for the loss of services of such minor child and also for the mental pain and suffering of plaintiff resulting from the injury and death of said minor child, to the damage of the plaintiff in the sum of $25,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $25,000.00.

Second Count

(2) Plaintiff is a resident of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the mother of Jack H. Stringfellow, deceased, a minor child, whose father, Guy Strongfellow is deceased, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin, and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section [fol. 29] of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931; at about the hour of six o'clock, P. M., the said Jack H. Stringfellow was riding in an automobile which was being driven by his father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross, and that at said time and place the said Jack H. Stringfellow

was struck and fatally injured by said Railroad Company's north bound passenger train No. 132, and that no alarm or warning of any kind was given of the approach of said train either by the ringing of its bell or the blowing of its whistle and said train was being run at a high and dangerous rate of speed and the plaintiff alleges that the speed of said train and the failure of the defendant to give warning of its approach either by the blowing of the whistle or the ringing of the bell at the time, place and under the circumstances, was negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Jack H. Stringfellow was fatally injured and from such injuries died on, to-wit: March 24th, 1931; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant damages for the loss of services of such minor child and also for the mental pain and suffering of plaintiff resulting from the injury and death of said minor child, to the damage of the plaintiff in the sum of $25,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $25,000.00.

Third Count

(1) Plaintiff is a resident of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the [fol. 30] mother of Jack H. Stringfellow, deceased, a minor child, whose father, Guy Stringfellow is deceased, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Rail-

road Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said Street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Jack H. Stringfellow was riding in an automobile which was being driven by his father Guy Stringfellow along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Jack H. Stringfellow was struck and fatally injured by said Railroad Company's north bound Passenger train No. 132, [fol. 31] said train being run at a high rate of speed over said Scotland Street crossing, and that if warning signals were given by said train, the speed of said train rendered such warning signals unavailing and useless to one approaching said crossing in an easterly direction along said street as the view of the tracks of said railroad were so obstructed as to render the approach to said tracks dangerous, which fact was known to said defendant or could have been known by it in the exercise of reasonable diligence, and the plaintiff alleges that the speed of said train at the time, place and under the circumstances constituted negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Jack H. Stringfellow was fatally injured and from such injuries dies on, to-wit: March 24th, 1931; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant damages for the loss of services of such minor child and also for the mental pain and suffering of plaintiff resulting from the injury and death of said minor child, to the damage of the plaintiff in the sum of $25,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be re-

covered under this action against said defendant and claims damages in the sum of $25,000.00.

Fourth Count

(1) Plaintiff is a resident of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the mother of Jack H. Stringfellow, deceased, a minor child, whose father Guy Stringfellow is deceased, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. [fol. 32] Petersburg, Florida, to Jacksonville, Florida, and running in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock, P. M., the said Jack H. Stringfellow was riding in an automobile which was being driven by his father, Guy Stringfellow along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Jack H. Stringfellow was struck and fatally injured by said Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing; that at the time aforesaid there was a

strong wind blowing from the northwest which was known to said defendant, or could have been known to a person in possession of his ordinary faculties and the sound of the approaching train and warnings of its approach, if any, were obstructed by the wind to one approaching said crossing while travelling in an easterly direction along said [fol. 33] street and that in approaching said railroad tracks in an easterly direction along said Scotland Street intervening objects prevent the view of an approaching train from the south until within a few feet of the tracks of said railroad and that at said time and place the said defendant failed to exercise such care, prudence and caution as the circumstances of said crossing reasonably demanded of it in that said train approached and passed over said crossing at a high rate of speed and failed to give suitable and proper warning of its approach and that it was the duty of said defendant to warn by appropriate signals all persons who may have been upon said Scotland Street of the approach of said train, and the said defendant failed to use such ordinary precaution as the exergencies of the circumstances required, to warn all persons who might have been upon said Scotland Street near said railroad crossing and that the failure of said defendant to observe this duty which it owed to the public in general and to the said deceased, was negligence and such failure was the proximate cause of the injury and death of the said Jack H. Stringfellow. And the plaintiff avers that by reason of said negligence of the defendant the said Jack H. Stringfellow was fatally injured and from such injuries died on, to-wit: March 24th, 1931; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant damages for the loss of services of such minor child and also for the mental pain and suffering of plaintiff resulting from the injury and death of said minor child, to the damage of the plaintiff in the sum of $25,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $25,000.00.

Fifth Count

(1) Plaintiff is a resident of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the

[fol. 34] mother of Jack H. Stringfellow, deceased, a minor child, whose father, Guy Stringfellow is deceased, and the defendant, Atlantic Coast Line Railroad Company is a corporation chartered under the laws of the State of Virginia and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, runing north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said Railroad crossing is a populous section of said city, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock, P. M., the said Jack H. Stringfellow was riding in an automobile which was being driven by his father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Jack H. Stringfellow was struck and fatally injured by said Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing; and plaintiff further avers that said defendant, Railroad Company, had been in the habit [fol. 35] of, and had generally and customarily been, running said engine and train of cars in and through the incorporated City of Dunedin and over said crossing, at a high, reckless and dangerous rate of speed, in flagrant violation of the rights of persons who may have been upon

said Scotland Street, and the said defendant could reasonably have foreseen or contemplated that the running of said train in and through the said City of Dunedin and over and across said Scotland Street at an excessive rate of speed, considering the ordinary conditions of human activities in said City of Dunedin at said crossing, would probably result in an injury to persons lawfully upon said street, and that the excessive rate of speed of said train in and through said City of Dunedin and over and across said Scotland Street at the time aforesaid, constituted negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Jack H. Stringfellow was fatally injured and from such injuries dies on, to-wit: March 24th, 1931; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant damages for the loss of service of such minor child and also for the mental pain and suffering of plaintiff resulting from the injury and death of said minor child, to the damage of the plaintiff in the sum of $25,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $25,000.00.

Campbell & McLean, by Wm. C. McLean, Solicitors for Plaintiff.

[fol. 36] IN UNITED STATES DISTRICT COURT

No. 2732-T

[Title omitted]

PLEA—Filed July 6, 1931

Now comes the Defendant, Atlantic Coast Line Railroad Company, a corporation, in the above-entitled cause, by its undersigned attorneys, and for Plea to Plaintiff's Declaration, and each count thereof, filed in said cause, says:

1. That it is not guilty.

Jas. R. Bussey, Sam H. Mann, Jr., McKinney Barton.

Duly sworn to by McKinney Barton. Jurat omitted in printing.

[fol. 37] IN UNITED STATES DISTRICT COURT

No. 2733

[Title omitted]

AMENDED DECLARATION—Filed May 25, 1931

Plaintiff, Sarah Elizabeth Stringfellow, a widow, by her attorneys, Campbell & McLean, sues the Atlantic Coast Line Railroad Company, a corporation, defendant herein, who has been summoned to answer the plaintiff in a civil action for damages.

First Count

(1) Plaintiff is a resident and citizen of Pinellas County Florida, and the widow of Guy Stringfellow, deceased, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and running in and through the incorporated [fol. 38] City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of the said Railroad Company, running North and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the

9th day of March, 1931, at about the hour of six o'clock P. M., the said Guy Stringfellow was travelling along said Scotland Street in his automobile, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross, and that at the said time and place the defendant Railroad Company carelessly and negligently propelled and ran its train, against and upon the said automobile which said deceased was driving aforesaid, and upon said Guy Stringfellow, deceased, with great force and violence, whereby deceased was then and there, by said negligence and carelessness of the defendant, killed; and plaintiff alleges that by reason of the premises she has been deprived of the support, maintenance, and prospective earnings of her said deceased husband, which she is entitled to receive, and has also been deprived of the comfort, association and protection of said deceased, to the damage of the plaintiff in the sum of $20,000.00.

Wherefore plaintiff sues and demands judgment against said defendant and claims damages in the sum of $30,000.00.

[fol. 39] Second Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks

of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Guy Stringfellow was travelling along said Scotland Street in his automobile, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Guy Stringfellow was struck and killed by said Railroad Com-
[fol. 40] pany's north bound passenger train No. 132, and that no alarm or warning of any kind was given of the approach of said train either by the ringing of its bell or the blowing of its whistle and said train was being run at a high and dangerous rate of speed and the plaintiff alleges that the speed of said train and the failure of the defendant to give warning of its approach either by the blowing of the whistle or the ringing of the bell at the time, place and under the circumstances, was negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Guy Stringfellow was killed; and plaintiff alleges that by reason of the premises she has been deprived of the support, maintenance, and prospective earnings of her said deceased husband, which she is entitled to receive and has also been deprived of the comfort, association and protection of said deceased, to the damage of the plaintiff in the sum of $30,000.00.

Wherefore plaintiff sues and demands judgment against said defendant and claims damages in the sum of $30,000.00.

Third Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurte-

nances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through the said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

[fol. 41] (2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about *the hour of six o'clock* P. M., the said Guy Stringfellow was travelling along said Scotland Street in his automobile, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Guy Stringfellow was struck and killed by said Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing, and that if warning signals were given by said train, the speed of said train rendered such warning signals unavailing and useless to one aproaching said crossing in an easterly direction along said street as the view of the tracks of said railroad were so obstructed as to render the approach to said tracks dangerous, which fact was known to said defendant or could have been known by it in the exercise of reasonable diligence, and the plaintiff alleges that the speed of said train at the time, place and under the circumstances constituted negligence. And the plaintiff avers that by reason of said negligence of the [fol. 42] defendant the said Guy Stringfellow was killed;

and plaintiff alleges that by reason of the premises she has been deprived of the support maintenance, and prospective earnings of her said deceased husband, which she is entitled to receive and has also been deprived of the comfort, association and protection of said deceased, to the damage of the plaintiff in the sum of $30,000.00.

Wherefore plaintiff sues and demands judgment against said defendant and claims damages in the sum of $30,000.00.

Fourth Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotive and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said rail- [fol. 43] road crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Guy Stringfellow was traveling along said Scotland Street in his automobile, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and

cross and that at said time and place the said Guy Stringfellow was struck and killed by said Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing; that at the time aforesaid there was a strong wind blowing from the northwest which was known to said defendant, or could have been known to a person in possession of his ordinary faculties, and the sound of the approaching train and warnings of its approach, if any, were obstructed by the wind to one approaching said crossing while travelling in an easterly direction along said street and that in approaching said railroad tracks in an easterly direction along said Scotland Street intervening objects prevent the view of an approaching train from the south until within a few feet of the tracks of said railroad and that at said time and place the said defendant failed to exercise such care, prudence and caution as the circumstances of said railroad crossing reasonably demanded of it in that said train approached and passed over said crossing at a high rate of speed and failed to give suitable and proper warning of its approach and that it was the duty of said defendant to warn by appropriate signals all persons who may have been upon said Scotland Street of the approach of said train, and the said defendant failed to use such ordinary precaution as the exergencies of the circumstances required, to warn all persons who might have been upon said Scotland Street near said railroad crossing and that the failure of said defendants to observe this duty which it [fol. 44] owed to the public in general and to the deceased, was negligence and such failure was the proximate cause of the injury and death of the said Guy Stringfellow. And the plaintiff avers that by reason of said negligence of the defendant the said Guy Stringfellow was killed; and plaintiff alleges that by reason of the premises she has been deprived of the support, maintenance, and prospective earnings of her said deceased husband, which she is entitled to receive and has also been deprived of the comfort, association and protection of said deceased, to the damage of the plaintiff in the sum of $30,000.00.

Wherefore plaintiff sues and demands judgment against said defendant and claims damages in the sum of $30,000.00.

Fifth Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the widow of Guy Stringfellow, deceased, and the defendant Atlantic Coast Line Railroad Company, is a coporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotive and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scot [fol. 45] land Street is used constantly and habitually by pedestrians and those traveling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Guy Stringfellow was travelling along said Scotland Street in his automobile going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Guy Stringfellow was struck and killed by said Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing; and plaintiff further avers that said defendant, Railroad Company, had been in the habit of and had generally and customarily been, running said engine and train of cars in and through the incorporated City of Dunedin and over said crossing, at a high, reckless, and dangerous rate of speed, in flagrant violation of

the rights of persons who may have been upon said Scotland Street, and the said defendant could reasonably have for-seen or contemplated that the running of said train in and through the said City of Dunedin and over and across said Scotland Street at an excessive rate of speed, considering the ordinary conditions of human activities in said City of Dunedin at said crossing, would probably result in an injury to persons lawfully upon said street, and that the excessive rate of speed of said train in and through said City of Dunedin and over and across said Scotland Street at the time aforesaid, constituted negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Guy Stringfellow was killed; and plain-
[fol. 46] tiff alleges that by reason of the premises she has been deprived of the support, maintenance, and prospective earnings of her said deceased husband, which she is entitled to receive and has also been deprived of the comfort, association and protection of said deceased, to the damage of the plaintiff in the sum of $30,000.00.

Wherefore plaintiff sues and demands judgment against said defendant and claims damages in the sum of $30,000.00.

Campbell & McLean, by Wm. C. McLean, Attorneys for Plaintiff.

[fol. 47] IN UNITED STATES DISTRICT COURT

No. 2733-*T*.

[Title omitted]

PLEA—Filed July 6, 1931

Now comes the Defendant, Atlantic Coast Line Railroad Company, a Corporation, in the above-entitled cause, by its undersigned attorneys, and for Plea to the Plaintiff's declaration, and each Count thereof, filed in said cause, says:

1. That it is not guilty.

Jas. R. Bussey, Sam H. Mann, Jr., McKinney Barton, Attorneys for Defendant.

Duly sworn to by McKinney Barton. Jurat omitted in printing.

[fol. 48] IN UNITED STATES DISTRICT COURT

No. 2734

[Title omitted]

Civil Action. Damages: $15,000.00

AMENDED DECLARATION—Filed May 25, 1931

Plaintiff, Sarah Elizabeth Stringfellow, as administratrix of the estate of Jack H. Stringfellow, deceased, by her attorneys, Campbell & McLean, sues the Atlantic Coast Line Railroad Company, a corporation, defendant herein, who has been summoned to answer the plaintiff in a civil action for damages.

First Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the Defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinelles, and State of Florida, and in and through the incor- [fol. 49] porated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running North and South, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrains and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and

recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Jack H. Stringfellow was riding in an automobile which was being driven by his father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross, and that at the said time and place the defendant Railroad Company, carelessly and negligently propelled and ran its train against and upon the said automobile in which said deceased was riding, aforesaid, and upon said Jack H. Stringfellow, deceased, with great force and violence, whereby deceased was then and there, by said negligence and carelessness of the defendant, fatally injured and from such injuries died on, to-wit: March 24th, 1931; and that the said Jack H. Stringfellow died leaving neither widow nor minor child or children, nor any person or persons dependent upon him, the said Jack H. Stringfellow, for a support; that the said Sarah Elizabeth Stringfellow, [fol. 50] plaintiff, was on to-wit: March 25th, 1931, duly appointed as administratrix of the estate of the said Jack H. Stringfellow, deceased; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant the pecuniary value of the prospective earnings and savings that the said deceased could reasonably have expected but for the death of said deceased, to the damage of the plaintiff in the sum of $15,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $15,000.00.

Second Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated

City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin, and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland Street [fol. 51] is used constantly and habitually by pedestrains and those travelling in conveyances of all kinds, and in one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M. the said Jack H. Stringfellow was riding in an automobile which was being driven by his father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland street intersect and cross, and that at said time and place the said Jack H. Stringfellow was struck and fatally injured by said Railroad Company's north bound passenger train No. 132 and that no alarm or warning of any kind was given of the approach of said train either by the ringing of its bell or the blowing of its whistle and said train was being run at a high and dangerous rate of speed and the plaintiff alleges that the speed of said train and the failure of the defendant to give warning of its approach either by the blowing of the whistle or the ringing of the bell at the time, place and under the circumstances, was neligence. And the plaintiff avers that by reason of said negligence of the defendant the said Jack H. Stringfellow was fatally injured and from such injuries died on, to-wit: March 24th, 1931, and that said Jack H. Stringfellow died leaving neither widow now minor child or children, nor any person or persons dependent upon him, the said Jack H. Stringfellow, for a support; that the said Sarah Elizabeth Stringfellow, plaintiff, was on to-wit: March 25th, 1931, duly appointed

as administratrix of the estate of the said Jack H. Stringfellow, deceased; and plaintiff alleges that by reason of the premises she is entitled to recover of any from said defend- [fol. 52] ant the pecuniary value of the prospective earnings and savings that the said deceased could reasonably have expected but for the death of said deceased, to the damage of the plaintiff in the sum of $15,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $15,000.00.

Third Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through said County of Pinellas, and State of Florida, and in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto, that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the [fol. 53] main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Jack H. Stringfellow was riding in an automobile which was being driven by his father Guy Stringfellow

along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Jack H. Stringfellow was struck and fatally injured by said Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing, and that if warning signals were given by said train, the speed of said train rendered such warning signals unavailing and useless to one approaching said crossing in an easterly direction along said street as the view of the tracks of said railroad were so obstructed as to render the approach to said tracks dangerous, which fact was known to said defendant or could have been known by it in the exercise of reasonable diligence, and the plaintiff alleges that the speed of said train at the time, place and under the circumstances constituted negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Jack H. Stringfellow was fatally injured and from such injuries died on, to-wit: March 24th, 1931; and that said Jack H. Stringfellow died leaving neither widow nor minor child or children, nor any person or persons dependent upon him, the said Jack H. Stringfellow, for a support; that the said Sarah Elizabeth Stringfellow, plaintiff, was on, to-wit: March 25th, 1931, duly appointed as administratrix of the estate of said Jack H. Stringfellow, deceased, and plaintiff alleges that by reason of the premises she is entitled to recover of and from said [fol. 54] defendant the pecuniary value of the prospective earnings and savings that the said deceased could reasonably have expected but for the death of said deceased, to the damage of the plaintiff in the sum of $15,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $15,000.00.

Fourth Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the

State of Virginia, and owns and/or operates a railroad, tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through the incorporated City of Dunedin, Pinellas County, Florida, and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company, running north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and in one of the main thoroughfares of said City, and the point of said railroad crossing is a populous section of said City and is con- [fol. 55] stantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock, P. M., the said Jack H. Stringfellow was riding in an automobile which was being driven by his father, Guy Stringfellow, along said Scotland Street going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant Company and said Scotland Street intersect and cross and that at said time and place the said Jack H. Stringfellow was struck and fatally injured by said Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing; that at the time aforesaid there was a strong wind blowing from the northwest which was known to said defendant, or could have been known to a person in possession of his ordinary faculties and the sound of the approaching train and warnings of its approach, if any, were obstructed by the wind to one approaching said crossing while travelling in an easterly direction along said street and that in approaching said railroad tracks in an easterly direction along said Scotland Street intervening objects prevent the view of an approaching train from the south until within a few feet of the tracks of said rail-

road, and that at said time and place the said defendant failed to exercise such care, prudence and caution as the circumstances of said crossing reasonably demanded of it in that said train approached and passed over said crossing at a high rate of speed and failed to give suitable and proper warning of its approach and that it was the duty of said defendant to warn by appropriate signals all persons who may have been upon said Scotland Street of the approach of said train, and the said defendant failed to use such ordinary precaution as the exergencies of the circumstances required, to warn all persons who might have been upon said Scotland Street near said railroad crossing and [fol. 56] that the failure of said defendant to observe this duty which it owned to the public in general and to the said deceased, was negligence and such failure was the proximate cause of the injury and death of the said Jack H. Stringfellow. And the plaintiff avers that by reason of said negligence of the defendant the said Jack H. Stringfellow was fatally injured and from such injuries died on, to-wit: March 24, 1931; and that said Jack H. Stringfellow died leaving neither widow nor minor child or children, nor any person or persons dependent upon him, the said Jack H. Stringfellow, for a support; that the said Sarah Elizabeth Stringfellow, plaintiff, was on, to-wit: March 25th, 1931, duly appointed as administratrix of the estate of the said Jack H. Stringfellow, deceased; and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant the pecuniary value of the prospective earnings and savings that the said deceased could reasonably have expected but for the death of said deceased, to the damage of the plaintiff in the sum of $15,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $15,000.00.

Fifth Count

(1) Plaintiff is a resident and citizen of Pinellas County, Florida, and the defendant, Atlantic Coast Line Railroad Company, is a corporation chartered under the laws of the State of Virginia, and owns and/or operates a railroad,

tracks, cars, locomotives and other railroad appliances and appurtenances and operates its trains on said railroad extending from St. Petersburg, Florida, to Jacksonville, Florida, and running in and through the incorporated City of [fol. 57] Dunedin, Pinellas County, Florida and receives and transports passengers and freight for hire, as a common carrier.

(2) Plaintiff further avers that the defendant was running and operating a train on the tracks of the said Railroad Company in and through said incorporated City of Dunedin and over and across Scotland Street in said City on the 9th day of March, 1931; that said Scotland Street is a public thoroughfare running east and west and the tracks of said Railroad Company running north and south, cross said street at right angles thereto; that said Scotland Street is used constantly and habitually by pedestrians and those travelling in conveyances of all kinds, and is one of the main thoroughfares of said City, and the point of said Railroad crossing is a populous Section of said City, and is constantly and habitually used by people in crossing and recrossing said railroad tracks; that on the 9th day of March, 1931, at about the hour of six o'clock P. M., the said Jack H. Stringfellow was riding in an automobile which was being driven by his father, Guy Stringfellow, along said Scotland Street, going in an easterly direction at a point on said Scotland Street where the railroad tracks of the defendant company and said Scotland Street intersect and cross and that at said time and place the said Jack H. Stringfellow was struck and fatally injured by said Railroad Company's north bound passenger train No. 132, said train being run at a high rate of speed over said Scotland Street crossing; and plaintiff further avers that said defendant, Railroad Company, had been in the habit of, and had generally and customarily been running said engine and train of cars in and through the incorporated City of Dunedin and over said crossing, at a high, reckless and dangerous rate of speed, in flagrant violation of the rights of persons who may have been upon said Scotland Street, and the said defendant could reasonably have foreseen or contemplated that the running of said train in and through the said City of Dunedin and over and across said Scotland Street

[fol. 58] at an excessive rate of speed, considering the ordinary conditions of human activities in said City of Dunedin at said crossing, would probably result in an injury to persons lawfully upon said Street, and that the excessive rate of speed of said train in and through said City of Dunedin and over and across said Scotland Street at the time aforesaid, constituted negligence. And the plaintiff avers that by reason of said negligence of the defendant the said Jack H. Stringfellow was fatally injured and from such injuries died on, to wit: March 24th, 1931; and that said Jack H. Stringfellow died leaving neither widow nor minor child or children, nor any person or persons dependent upon him, the said Jack H. Stringfellow, for support; that the said Sarah Elizabeth Stringfellow, plaintiff, was on, to-wit: March 25th, 1931, duly appointed as administratrix of the estate of the said Jack H. Stringfellow, deceased, and plaintiff alleges that by reason of the premises she is entitled to recover of and from said defendant the pecuniary value of the prospective earnings and savings that the said deceased could reasonably have expected but for the death of said deceased, to the damage of the plaintiff in the sum of $15,000.00.

Wherefore plaintiff sues and demands judgment for damages of every kind and character which may lawfully be recovered under this action against said defendant and claims damages in the sum of $15,000.00.

Campbell & McLean, by Wm. C. McLean, Attorneys for Plaintiff.

[fol. 59] IN UNITED STATES DISTRICT COURT

No. 2734

[Title omitted]

PLEA—Filed July 6, 1931

Now comes the defendant, Atlantic Coast Line Railroad Company, a Corporation, in the above-entitled cause, by

its undersigned attorneys, and for Plea to Plaintiff's Declaration, and each count thereof, filed in said cause, says:

1. That it is not guilty.

Jas. R. Bussey, Sam H. Mann, Jr., McKinney Barton, Attorneys for Defendant.

Duly sworn to by McKinney Barton. Jurat omitted in printing.

[fol. 60] IN UNITED STATES DISTRICT COURT

No. 2730-T. Civ.

[Title omitted]

VERDICT—Filed Feb. 3, 1932

We, the jury, find the defendant not guilty. So say we all.
Holland McCormick, Foreman.

IN UNITED STATES DISTRICT COURT

No. 2731-T. Civ.

[Title omitted]

VERDICT—Filed Feb. 3, 1932

We, the jury, find the defendant not guilty. So say we all.
Holland McCormick, Foreman.

IN UNITED STATES DISTRICT COURT

No. 2732-T. Civ.

[Title omitted]

VERDICT—Filed Feb. 3, 1932

We, the jury, find the defendant not guilty. So say we all.
Holland McCormick, Foreman.

In United States District Court

No. 2733-T. Civ.

[Title omitted]

Verdict—Filed Feb. 3, 1932

We, the jury, find the defendant not guilty. So say we all.

Holland McCormick, Foreman.

[fol. 61] In United States District Court

No. 2734-T. Civ.

[Title omitted]

Verdict—Filed Feb. 3, 1932

We, the jury, find the defendant not guilty. So say we all.

Holland McCormick, Foreman.

In United States District Court

No. 2730-T

Sarah Elizabeth Stringfellow, as Administratrix of the Estate of Hazel Stringfellow, Deceased,

v.

Atlantic Coast Line Railroad Company, a Corporation

Judgment—Feb. 13, 1932

The jury empanelled in the above entitled cause having heretofore rendered their verdict in favor of the defendant on the 3d day of February, 1932, it is thereupon considered, ordered and adjudged by the court that the defendant herein, Atlantic Coast Line Railroad Company, a corporation, do go hence without day, and that plaintiff take nothing by its plaint in said cause and that said defendant do have and recover of and from the plaintiff herein, Sarah

Elizabeth Stringfellow, as Administratrix of the Estate of [fol. 62] Hazel Stringfellow, deceased, the costs of court expended in their behalf herein, taxed at $—, for which let execution issue.

Alexander Akerman.

IN UNITED STATES DISTRICT COURT

No. 2731-T

SARAH ELIZABETH STRINGFELLOW, a Widow, Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Defendant

JUDGMENT—Feb. 13, 1932

The jury empanelled in the above entitled cause having heretofore rendered their verdict in favor of the defendant on the 3d day of February, 1932, it is thereupon considered, ordered and adjudged by the court that the defendant herein, Atlantic Coast Line Railroad Company, a corporation, do go hence without day, and that plaintiff take nothing by its plaint in said cause and that said defendant do have and recover of and from the plaintiff herein, Sarah Elizabeth Stringfellow, a widow, the costs of court expended in their behalf herein, taxed at $—, for which let execution issue.

Alexander Akerman.

[fol. 63] IN UNITED STATES DISTRICT COURT

No. 2732-T

SARAH ELIZABETH STRINGFELLOW, a Widow, Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Defendant

JUDGMENT—Feb. 13, 1932

The jury empanelled in the above cause having heretofore rendered their verdict in favor of the defendant on the 3d day of February, 1932, it is thereupon considered, ordered and adjudged by the court that the defendant herein,

Atlantic Coast Line Railroad Company, a corporation, do go hence without day and that plaintiff take nothing by its plaint in said cause and that said defendant do have and recover of and from the plaintiff herein, Sarah Elizabeth Stringfellow, a widow, the costs of court expended in their behalf herein, taxed at $—, for which let execution issue.

Alexander Akerman.

In United States District Court

No. 2733-T

Sarah Elizabeth Stringfellow, a Widow, Plaintiff,

v.

Atlantic Coast Line Railroad Company, a Corporation, Defendant

Judgment—Feb. 13, 1932

The jury empaneled in the above entitled cause having heretofore rendered their verdict in favor of the defendant on the 3d day of February, 1932, it is thereupon considered, [fol. 64] ordered and adjudged by the court that the defendant herein, Atlantic Coast Line Railroad Company, a corporation, do go hence without day, and that the plaintiff take nothing by its plaint in said cause and that said defendant do have and recover of and from the plaintiff herein, Sarah Elizabeth Stringfellow, a widow, the costs of court expended in their behalf, herein, taxed at $—, for which let execution issue.

Alexander Akerman.

In United States District Court

No. 2734-T

Sarah Elizabeth Stringfellow, as Administratrix of the Estate of Jack H. Stringfellow, Deceased, Plaintiff,

v.

Atlantic Coast Line Railroad Company, a Corporation, Defendant

Judgment—Feb. 13, 1932

The jury empaneled in the above cause having heretofore rendered their verdict in favor of the defendant on

the 3d day of February, 1932, it is thereupon considered, ordered and adjudged by the court that the defendant herein, Atlantic Coast Line Railroad Company, a corporation, do go hence without day and that plaintiff take nothing by its plaint in said cause and that said defendant do have and recover of and from the plaintiff herein, Sarah Elizabeth Stringfellow, as Administratrix of the Estate of Jack H. Stringfellow, Deceased, the costs of court expended in their behalf herein, taxed at $—, for which let execution issue.

Alexander Akerman.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Titles omitted]

ORDER EXTENDING TIME—Feb. 5, 1932

The time to file the bills of exceptions and statement of the case by each of the plaintiffs and appellants in each of the above entitled causes (the same having been consolidated on the order of the trial court) is hereby extended for a period of eighty days from February 3, 1932, and the present term of Court is hereby extended for such purpose.

Done this the 5th day of February, A. D. 1932, at Tampa, Florida.

(Signed) Alexander Akerman, Judge U. S. District Court for the Southern District of Florida.

[fol. 66] IN UNITED STATES DISTRICT COURT

No. 2730, No. 2731, No. 2732, No. 2733, No. 2734

[Titles omitted]

[fol. 67] AFFIDAVIT OF SARAH ELIZABETH STRINGFELLOW

Sarah Elizabeth Stringfellow, being duly sworn according to law, deposes and says that she is the plaintiff in the

above entitled actions; that she is a citizen of the United States, and because of her poverty, she is unable to pay the cost of the appeal in the above causes or to give security therefor, and that no person properly interested in the aforesaid causes is able to pay or to secure the cost of appeal in said causes.

Sarah Elizabeth Stringfellow.

Sworn to and Subscribed before me this the 20 day of February, A. D. 1932. My Commission expires Feb. 22, 1935. Carmen G. Falsone, Notary Public.

ORDER OF THE COURT

It is ordered that the plaintiff in the above-entitled actions be, and she is hereby, permitted to appeal said actions to conclusions without prepayment of fees or costs.

Done and ordered at Tampa, Florida, this the 16th day of March, A. D. 1932.

Alexander Akerman, District Judge.

[fol. 68] IN UNITED STATES DISTRICT COURT

No. 2730, No. 2731, No. 2732, No. 2733, No. 2734

[Titles omitted]

[fol. 69] PETITION FOR APPEAL—Filed April 20, 1932

The plaintiff in each of the above named causes, conceiving herself aggrieved by the judgment made and entered on the 13th day of February, 1932, in each of the above entitled causes does hereby appeal from said judgments to the United States Circuit Court of Appeals for the Fifth Circuit, for the reason specified on the Assignment of Errors, which is filed herewith, and she prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgments were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, in accord-

ance with the statutes and rules of the Court in such cases provided.

Doyle Campbell, Wm. C. McLean, Attorneys for Plaintiff.

[fol. 70] IN UNITED STATES DISTRICT COURT

No. 2730, No. 2731, No. 2732, No. 2733, No. 2734

[Titles omitted]

[fol. 71] ORDER ALLOWING APPEAL—April 20, 1932

On motion of Doyle Campbell and Wm. C. McLean, attorneys and counsel for plaintiff in each of the above causes, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Fifth Circuit from the final judgment heretofore entered in each of said causes be and the same is hereby allowed and that a certified transcript of the record and all proceedings be forthwith transmitted to said Circuit Court of Appeals.

It is further ordered that no cost bond shall be required of the plaintiff in said causes, the Court having heretofore entered an order allowing an appeal in forma pauperis.

Done and Ordered at Tampa, Florida, this the 20th day of April, A. D. 1932.

Alexander Akerman, Judge.

[fol. 72] IN UNITED STATES DISTRICT COURT

No. 2730, No. 2731, No. 2732, No. 2733, No. 2734

[Titles omitted]

[fol. 73] ASSIGNMENTS OF ERROR—Filed April 20, 1932

Comes now the plaintiff in each of the above entitled causes and assigns errors in the trial and decision of the District Court, as follows:

1. The said Court erred in sustaining the motion made by counsel for defendant, that the Court direct the Jury

to return a verdict in favor of the defendant, made upon the conclusion of all the testimony introduced upon the trial of the case.

2. The said Court erred in charging the Jury to return a verdict for the defendant.

3. The said Court erred in not submitting for determination the issues between the parties to the Jury.

4. The said Court erred in sustaining the objection of counsel for the defendant to the following question asked the witness, Mary Mildred Smith, by counsel for plaintiff: "Q. You stated a little while ago that it was not making any noise. Were they ringing any bells or sounding any whistles?"

5. The said Court erred in sustaining the objection of counsel for defendant to the following question asked the witness, Harry Lishness, by counsel for plaintiff: "Q. What warning, or signals were given by this train on this afternoon before it reached Albert Street, if any?"

6. The said Court erred in sustaining the objection [fol. 74] of counsel for defendant to the following question asked the witness, George W. Smart, by counsel for plaintiff: "Q. Was there any ringing of the bells or blowing of the whistles?"

7. The said Court erred in overruling the objecton of counsel for plaintiff to the following question asked the witness, Mabel L. Seeley by counsel for defendant: "Q. Please state in your own way, where you were, what you were doing and what you heard and what you saw."

8. The said Court erred in overruling the objection of counsel for the plaintiffs to the following question asked the witness, Mabel L. Seeley, by counsel for defendant; and the answer thereto: "Q. State whether or not the driver of this automobile stopped from the time you first — him until the happening of the accident." "A. He did not stop. He slackened his pace a little bit."

9. The said Court erred in overruling the objection of counsel for the plaintiffs to the following question asked the witness, Mabel L. Seeley, by counsel for defendant; and the answer thereto. "Q. State whether or not the driver

of this automobile looked in the direction from which the train was coming before he entered upon the tracks." "A. Yes, it appeared to me that he did. He looked towards the train and then made a dash right across."

10. The said Court erred in overruling the objection of counsel for the plaintiffs to the following question asked the witness, Mabel L. Seeley, by counsel for defendant; and the answer thereto. "Q. After he had looked in the direction from which the train was approaching, what, if anything, did he do?" "A. He seemed to speed up to cross the tracks."

11. The said Court erred in overruling the objection [fol. 75] of counsel for the plaintiffs to the following question asked the witness, Mabel L. Seeley, by counsel for defendant; and the answer thereto: "Q. State whether the automobile was going fast or slow when you first saw it." "A. It was a T. Model Ford and it was rattling good."

Wherefore plaintiff in each of the above causes prays that the judgment of the District Court of the United States in and for the Southern District of Florida, in each of the said causes entered, be reversed and that the said District Court be directed to grant a new trial in each of the said causes.

Doyle Campbell, Wm. C. McLean, Attorneys for Plaintiffs.

Received a copy of the foregoing Assignment of Errors this April 20th, 1932.

Bussey, Mann & Barton, per McKinney Barton.

[fol. 76] IN UNITED STATES DISTRICT COURT

No. 2730, No. 2731, No. 2732, No. 2733, No. 2734

[Titles omitted]

[fol. 77] **Bill of Exceptions**—Filed April 20, 1932

Be it remembered that on the trial of the above causes at the regular February term, A. D. 1932, of the said Court,

the Honorable Alexander Akerman, Judge, presiding, when the following proceedings were had, to-wit:

The Court of its own motion directed the Clerk of said Court to enter the following order:

ORDER CONSOLIDATING CAUSES

It is ordered that the above entitled causes, Nos. 2730, 2731, 2732, 2733 and 2734 be, and the same are hereby consolidated for trial.

Both sides being present by counsel and announcing ready for trial, thereupon to try the issues therein, a Jury was empanelled and sworn according to law, and thereupon the plaintiff, to establish the issues upon her part, offered the following witnesses as her evidence in chief:

SARAH ELIZABETH STRINGFELLOW, the plaintiff, being duly sworn, deposed and testified as follows:

My name is Sarah Elizabeth Stringfellow, and I am the widow of Guy Stringfellow, deceased, and I live at Dunedin, and married Mr. Stringfellow fifteen years ago. I have four children: Sarah Elizabeth Stringfellow, aged 14; Helen Holt Stringfellow, aged 12. The other children [fol. 78] were Jack Stringfellow, who was nine years old on March 9, 1931, and Hazel Stringfellow, who was seven years old on March 9, 1931. At the time of his death Guy Stringfellow was 35 years and I was 30 years old. For two years prior to his death he operated a shoe shop in Dunedin. At the time of his death he was strong and healthy. He was six feet two inches tall and weighed 238 pounds and was well built. While he was operating the shoe shop I was there every day and saw him make entries on the back of this calendar during the month of January, 1931, which figures represent his weekly income. For the week ending March 7, his income was $59.30.

A calendar was introduced in evidence without objection and shows the following earnings of the deceased for the periods, to-wit:

Jan. 3, 1931	42.05
" 10, "	64.60
" 17, "	58.65
" 24, "	73.60
" 31, "	75.00
Feb. 6, "	72.50
" 14, "	70.35
" 21, "	71.60
" 28, "	52.60
Mch. 7, "	59.30

On the afternoon of March 9, 1931, I was at my home about one mile south of Scotland Street and three short blocks east of the railroad track. I was in the back yard gathering oranges and saw the Southland train as it entered Dunedin. I did not hear any whistle or bells. The [fol. 79] little boy, Jack Stringfellow, and the little girl, Hazel Stringfellow, both went to school and they helped me around the house in cleaning up, bringing in wood and gathering fruit and things like that. I did not see them the afternoon they were killed until about 11:30 o'clock that night in the hospital in Clearwater. Hazel died at 1:30 o'clock the next morning and Mr. Stringfellow died at the same time. Pack lived for fifteen days afterwards. I would see him in the hospital two or three times a day and would go back at night. He was able to talk with me and he suffered terrible. His leg and foot were broken up to his knee, and his arm was broken and something went through his back that affected his spine. Hazel's skull was fractured. They never would tell me how bad she was hurt. My health at the time of the injury was good. After I had learned of the accident and while I was at the hospital my husband and little girl was living and during the time the little boy, Jack, was living, and since their death, it has caused me a lot of pain, loss of sleep, sorrows and I have lost in weight, and I am unhealthy now. I am not trained to make and earn a living. I was married when I was sixteen and my relationships with my husband were happy. His habits and conduct were pleasant.

J. A. MEASE, being duly sworn, deposed and testified as follows:

My name is J. A. Mease, Jr. I am a physician. I knew Guy Stringfellow in his life time. On the afternoon of March 9, 1931, about six or six fifteen o'clock in the afternoon, I was at the A. C. L. station in Dunedin and saw Mr. Stringfellow on the ground to the front and to the side of the locomotive along the railroad tracks between Scotland and Main Streets opposite the station. Mr. Stringfellow died the following morning at 1:36. Hazel Stringfellow died about 1:30 the following morning. Jack Stringfellow died on March 24, 1931. He was pretty badly man- [fol. 80] gled. Mr. Guy Stringfellow, before his injury was in good physical condition and so was Mrs. Guy Stringfellow. There was an automobile near where the bodies were found very near the west side of the locomotive. The railroad runs north and south.

(No cross-examination.)

MARY MILDRED SMITH, being duly sworn, deposed and testified as follows:

My name is Mary Mildred Smith. I live at Dunedin. On Monday afternoon, March 9, 1931, I saw the Southland train that goes through Dunedin a little after 6:00 o'clock. It passed me on Albert Street which runs east and west and is the first street south of Scotland Street. North of Scotland Street is Main Street on which the depot is located. The distance between Albert Street and Scotland Street is a short city block. The railroad tracks run north and south and cross Albert Street at right angles. I was traveling in a Buick coupe, going east and west of the Albert Street crossing as the Southland train crossed Albert Street that afternoon. It was not making any noise and was going unusually fast. I have had experience in observing and noticing the speed of trains as I have ridden in an automobile on roads going parallel with the railroad tracks and have noticed the speedometer of the car and the speed of the train. I have done this more than once, and I live about a block and one half from the railroad and work at the Florida Citrus Machinery Company

about a block from the Atlantic Coast Line tracks and see about six trains per day. I have lived in Dunedin for eleven years and have no interest in this case whatever, and am not related to any of the parties of interest. At the time the train crossed Albert street it was running between forty and fifty miles an hour.

Counsel for plaintiff asked the witness the following question:

[fol. 81] Q. You stated a minute ago that it was not making any noise. Were they ringing any bells or sounding any whistles?

A. No.

Mr. Barton: Counsel objects to that question in that way and moves to strike it. They may ask if she heard any.

The Court: Do not consider that, gentlemen. Strike that out.

To which ruling the plaintiff then and there excepted.

I did not hear any whistles nor hear any ringing of the bell and I did not hear the bell ringing after the train passed Albert Street and went north on the tracks to Scotland Street. There is not anything defective about my hearing. I could see the last coach of the train when the engine was at Scotland street and I was at Albert Street and from looking at this last coach of the train, the speed of the engine when it reached Scotland Street was about thirty five or forty miles an hour. On this afternoon the wind was blowing very hard from the northwest. This train was a through train and stopped at Dunedin only when it is flagged. I have seen this particular train on other days prior to this time when it crossed Scotland and Albert Streets, and the customary speed this particular train usually made at these crossings is about forty miles an hour. Main Street is the most traveled street in Dunedin, and is the one where the depot is located. Douglas Avenue is the second most traveled Street and to get onto Douglas Avenue most people use the Scotland Street crossing, which is just one block from the center of town.

Cross-examination:

On the evening I saw this train I was in an automobile going east on Albert Street with Mr. Ronald Douglas.

When I saw the train I had not yet reached the crossing and stopped west of the tracks about fifteen feet as the train went by.

[fol. 82] J. E. BERGERT, being duly sworn, deposed and testified as follows:

My name is J. E. Bergert. I live at Tampa, Florida; I am a commercial photographer and on March 11, 1931, I took some pictures at Dunedin, between Main Street and Scotland Street and Albert Street, also the A. C. L. track and also took one picture on March 13, 1931. I used a regular commercial camera and developed the photographs myself. The measurements of the distances shown on the photographs were made by me.

The witness identified four photographs which were introduced in evidence without objection as plaintiff's Exhibits 2, 3, 4, and 5, as a correct portrayal of the permanent physical conditions that existed at the time of the accident. (These exhibits ordered transmitted in connection with the transcript.)

Cross-examination:

At this time I took the pictures on the east and west sides of the track. There are places cut out of tires that say 'stop' on them.

HARRY LISHNESS, being duly sworn, deposed and testified as follows:

My name is Harry Lishness. I live in Dunedin at 326 Albert Street, and was living at that place on the 9th day of March, 1931. I live there about six months during the winter and I am not related to any of the parties in interest in this case. I recall the evening of March 9, 1931, the Southland train, when it was north bound and passing through the town of Dunedin. When this train passed I was in a warehouse parallel with the tracks and within four or five feet of the tracks. I was at an open window. The house is on the north side of Albert Street between Albert and Scotland Streets. I was in the house by my-

self; there was not anything to prevent me from hearing [fol. 83] the train well & distinctly as it went right by the side of me. I have had experience in noticing and observing the speed of trains as I travel back and forth in an automobile from the north to the south twice a year. I live in Maine and drive my car from Maine to Florida about two thousand miles and in driving along parallel with trains I have noticed the speedometer, especially up here in northern Florida, a number of times. When the train passed where I was just before the accident on Scotland Street, it was traveling from forty to fifty miles an hour. It shook the building I was in quite a little. It does not shake it when it is going slower.

Counsel for plaintiff asked the witness the following question:

Q. What warning or signals were given by this train on this afternoon before it reached Albert Street, if any?

Mr. Barton: That is objected to. He cannot testify to that unless he absolutely knows himself.

The Court: Objection sustained.

To which ruling the plaintiff then and there excepted.

I heard the big whistle when it blew at Sunset Point, a mile or mile and a half from town. After it gets by there they blew the smaller whistle. I heard the smaller whistle two or three times after the big whistle. When the air whistle blew, the train was this side of the water tank. South of Albert Street, two or three streets cross the railroad. Between Albert Street and where the wreck took place on Scotland Street, I did not hear any whistle blow or bell ring. I am familiar with the railroad tracks from where I was when this train passed on up to Scotland Street crossing. I go up the track two to four times a day dur- [fol. 84] ing the six months I am in Florida. On the west side of the Atlantic Coast Line Tracks, beginning at the corner where the track intersects with Scotland Street, there are bushes growing up there on a vacant lot and just behind that there is a palm tree. The palm tree, I would think, is 25 feet tall and the other trees have been cut down and they are laying there cut now. I would think they were from 15 to 25 feet. At the time of the accident these

trees that are now cut were standing. I do not know who cut them. On the afternoon of the accident it was quite windy. The wind was blowing from the Northwest. This train is due in Dunedin right around six o'clock. A few minutes past, I don't know exactly the minute. On the afternoon of March 9, 1931, this train came in from 15 to 20 minutes past six o'clock. The customary speed of this train as it passed Scotland Street going north is about 25 miles an hour. I have noticed it lots of times, living right there in view of it every day. The speed of the train as it passed the window where I was near the railroad track until the engine reached Scotland Street, was about the same.

(No cross-examination.)

GEORGE SMART, being duly sworn, deposed and testified as follows:

My name is George Smart. I have lived in Dunedin for eight years on the south side of Scotland Street which runs east and west, and on the west side of the Atlantic Coast Line Railroad. My residence is probably 190 feet from the railroad tracks. On the evening of March 9, 1931, when the Southland train went north bound through Dunedin and crossed Scotland Street, I was in the back of the lot where my residence is and when the train reached Scotland street I heard the crash. I was about 200 feet from the intersection of Scotland street and the railroad. I went up to the depot where the wrecked car was just a little south of the loading platform. When I got there the car [fol. 85] was just clear of the rails and the train. The front of the engine was about 40 feet south of the loading platform. It was quite windy that day. The wind was from the north or northwest. I did not hear any signal warnings from the train. I was out in the open and there was not anything to keep me from hearing.

Counsel for plaintiff then asked the witness the following question:

Q. Was there any ringing of the bell or blowing of the whistle?

A. No.

Mr. Barton: Objected to.

The Court: Objection sustained. He could not tell whether they did anything or not. He could only tell whether he heard it or not. He cannot give anything but negative testimony if he was not looking at it or operating it. The only possible way that he could tell whether the whistle sounded or the bell rung would be by his hearing and he could only say that he did not hear it. He said he was not looking at it, that is, he said he did not see it, but heard it.

To which ruling the plaintiff then and there excepted.

I did not hear any bells rung or whistles blown. There is a vacant lot between my residence lot and the railroad tracks. I have observed the condition of the growth on the line by the A. C. L. railroad tracks and this vacant lot just south of Scotland street and its condition was such on March 9, 1931, that you could not see a train from the South without being on the side track. The hedge of trees growing along this line that are there now is probably 15 feet and is not in the same condition now as it was on March 9, 1931. The usual and customary speed of this train as it crossed Scotland Street is probably 30 or 35 miles an hour.

[fol. 86] Cross-examination:

I heard the train coming and also heard the crash and when I got out there the train had already stopped.

Mrs. Crystal Towne, being duly sworn deposed and testified as follows:

I am Mrs. Crystal V. Towne. On March 9th of last year, I was at Mrs. George Smart's residence, in the garden, and as we went to leave we walked along on the west side of her house from her back door along to the front and across the front yard to where my automobile was parked on the north side of Scotland Street facing west towards the bay. As I crossed Mrs. Smart's yard and sidewalk and as I walked across the street to my automobile, I did not see, during that time, Mr. Guy Stringfellow and his two children

in an automobile pass by. They did not pass while I was there. When I reached my automobile I tried to open the left hand side door but it was locked and I asked Mrs. Mary Mesner, who was with me to walk around the car and get in on the right side and then unlock it so I could get in. I had to wait until she unlocked it and as I was standing in the street with my hand on the door waiting for her to open it, I looked right towards the railroad track and as I looked, the train came out from behind the tall bushes there at that time, and as the train came out from behind these bushes I saw it strike the car and carry it down the railroad tracks. I could not see the train before it came out from behind the bushes. I did not know who was in the automobile. I did not hear any whistle blow or any bell rung. I was about 150 feet from the railroad track. Immediately after the accident we drove around to where the train was to see what had happened. I saw the automobile still on the train, clinging to the train, on the cow catcher, the front part of the engine—right in front. I saw them back the train up and take the car loose. The front of the engine was just about even with the loading platform by the depot and they took the automobile off and [fol. 87] carried it over to the side.

(Witness was handed a photograph marked Plaintiff's Exhibit No. 3, being a photograph of the intersection of Scotland Street and the railroad tracks looking north, with the measurements thereon showing the depot platform to be 295 feet from the crossing and a wrecked car to be 275 feet from the crossing.)

I saw the automobile right here (indicating); that is the same position and place this automobile was, when it was taken off of the front of the engine. When I got to the railroad platform Mr. Stringfellow was still in the car. I did not see the children until after they had them on the loading platform.

C. W. CLEARY, being duly sworn, deposed and testified as follows:

My name is C. W. Cleary, and I live in Dunedin and I am the publisher of the Dunedin Times. On the evening

of March 9, 1931, when the north bound Southland train passed Scotland Street in Dunedin, Florida, I was in the office of the Dunedin Times Building on Scotland Street which is west of the railroad track and north of Scotland Street and approximately 90 to 100 feet from the intersection of Scotland Street and the A. C. L. tracks. I was in the front or office part, on the east side of the building. I did not see the train. I heard it come in; I heard the noise as it crossed the crossing. It was a bang. I didn't know what it was at the time. I heard the crash. About five minutes after the accident I went up to where the wreck was and saw them taking a Ford automobile off of the front of the engine. I saw Mr. Guy Stringfellow and his two children. Mr. Stringfellow was lying on the ground. My office has been located there on Scotland street for about three years. I have seen the train come in almost every night. The usual and customary speed that this train crossed the Scotland Street crossing was at least [fol. 88] 25 miles an hour.

OFFER IN EVIDENCE

Counsel for plaintiff then introduced the American Experience Tables of Mortality, showing that at the age of 30 years, the life expectancy is 31.78 years; and that the expectancy of a person 35 years old is 25.35 years. And while the tables do not show the expectancy of persons under 10 years of age, the expectancy at the age of 10 years is 48.72.

Whereupon plaintiff rested.

Whereupon the defendant offered and introduced the following evidence:

W. D. GILLEN, being duly sworn, deposed and testified as follows:

My name is W. D. Gillen. I am a law agent in the employ of the Atlantic Coast Line Railroad Company and have been for six years. I am familiar with the Scotland Street crossing at Dunedin, Florida, and was familiar with

it at the time of the happening of this accident on March 9, 1931.

(The witness was handed Plaintiff's Exhibit No. 3, same being a photograph of the intersection of Scotland Street and the A. C. L. Railroad looking north.)

There are three tracks of the A. C. L. Railroad at the intersection of Scotland Street. The first track on the west is a switch or house track; the next track is the main track and the track towards the east is the switch track or storage track. The middle track is the main line. I have not measured the distance from the west line of the west track to the west line of the main track. The gauge [fol. 89] is 4 feet, 4 inches; 15 feet and 8 inches is what the distance should be. It is 11 feet from the inside line of the house track to the west line of the main line. At the time this accident happened, there is a stop sign a little to the right of the middle of Scotland Street going east which is approximately 20 feet west of the west rail of the house track. At the stop sign there is a vacant lot on the south side of Scotland Street with some trees or shrubbery along the edge of it 30 feet from the main line, and the stop sign is about on a line with that shrubbery. At the stop sign you could see a train 250 feet towards the south.

The witness then identified six photographs which were taken at or near the intersection of Scotland Street and the railroad crossing which were without objection filed as Defendant's Exhibits Nos. A, B, C, D, E and F as a correct portrayal of the permanent physical conditions that existed at the time of the accident. (These exhibits ordered transmitted in connection with the transcript.)

Cross-examination:

It is not true that a man in an automobile must have the front wheels in the center of the first side track before he can see down the railroad track.

H. O. Bassett, being duly sworn, deposed and testified as follows:

I am H. O. Bassett, an engineer of the A. C. L. Railroad Company and have been for 40 years on the 19th day of last

December. My run is on the Southland, between Trilby and St. Petersburg and I have been on that run a couple of years and a little over. I am the engineer who was operating the train when Mr. Guy Stringfellow and his two children were struck and killed on March 9, 1931, at the Scotland Street crossing in Dunedin. The train was going north. I was on 132 train, they call it, and on entering Dunedin, I reduced speed when I got into the vicinity of these crossings down to around to 15 to 20 miles an hour at the first crossing, there are five crossings there and as I [fol. 90] approached nearer the town I got slower and slower and blowed for road crossings which consists of four blasts first; I got down to the last crossings which are nearly together, hardly a block apart, four more blasts of the whistle, winding up with the last blast of the whistle at this street where the accident occurred. As I was entering Scotland Street the fireman hollered to me just before the engine struck the crossing to hold it. I put the brakes on in emergency and proceeded to stop as quick as I could and that is all that there was to it. The air brakes were in first class condition. I had a bell on the train being operated by the automatic bell ringer which had been placed in operation on entering the fifth crossing south of the depot which I would call five blocks; there were some of them short blocks. The bell continued to ring until after the accident. After we stopped, somebody called the fireman's attention to it after we had gotten off of the engine, to stop the bell from ringing. We had only a steam whistle on the engine. We did not have any air whistle. The difference between an air whistle and a steam whistle is that the steam whistle is operated by 200 pounds of steam and the air is operated by 130 pounds of air. You can hear the air whistle a long ways. The steam whistle, of course, you can hear a great deal farther and we did not have an air whistle on this engine and it was the steam whistle that was being blown. I did not see the automobile and the occupants before the collision. I was on the east side of the train and the car was coming from the west. I don't know what became of it. The fireman was hollering to hold and I felt the crash and I didn't know whether I had knocked it off or what became of it. To stop the train I put the brakes in emergency. There is no better or quicker way of stopping

a train. I mean by emergency that I put her down to the last notch. That is the highest braking power. With service application we have about 60 pounds of pressure but with the emergency, I think we have got about 95 or 98.

[fol. 91] Cross-examination:

I am 66 years old. I have been on this particular run for about two years. I made this run on the Southland passing Dunedin, going north, every day. I am pretty well acquainted with each and every one of these crossings. I did not see the automobile at all. It approached the train from the left and I was on the right hand side. I put the emergency on just as soon as the fireman told me, that very second. I applied them when I was approaching Scotland Street. The fireman hollered to me just before the pilot entered. The engine had gone fully onto the crossing. I was just entering the street, the south side of the street. The engineer is the man that puts on the automatic bell ringer, and I put it on myself. It is the rules of the company that it shall ring when it goes through a town. Many of these towns object to me blowing the steam whistle. We have the steam whistle on this train. I had never heard of any ordinance in Dunedin, therefore I blowed the steam whistle, the only thing we had. I do not know what height the hedge is on the left hand side of the right of way, as you go north just before you enter Scotland Street. There is an obstruction there but not a great deal. It is not very thick whatever it is. The fireman was sitting on the seat box right up to the cab window. I could not say where he was looking at. I was looking ahead on my side. I had the right hand side of the engine and the street crossing to watch out and he had the left hand side. He told me about seeing this car just as the front of the train entered the street. He hollered to hold her, that means to stop. The emergency brakes were working all right. I had seven coaches, most of them were Pullman cars. The first two cars, I think were combination. The grade towards the depot is comparatively level along there. The engine was not coasting. I was working steam. I did not reverse the [fol. 92] engine. I stopped just as rapidly as I could. I put on all I had. It was 265 to 275 feet from the south side of Scotland Street where I put on the emergency to the place where I stopped the train. The pilot of the engine

stopped probably 8 or 10 feet south of where the loading platform is. The tracks were dry at that time. The weather was dry. A little cloudy, I think. I don't remember what time the train was due in Dunedin. I think it was 6:06. If it was we were about five or six minutes late. The number of this train was 132. It never has had a little air whistle on it. The length of the engine is 78 feet from the pilot to the back of the tank. I backed the train to get the automobile off of the front of it. There were three people in the automobile at the time. We took the three people out. When the train stopped the automobile was put out on the left hand side next to the depot. We backed up six or seven feet. The auto was not quite even with the front of the engine when it pulled out. We backed it back because it was wedged under the drawhead and we backed it back to loosen it because we could not turn the car over very well. I wound up blowing the steam whistle for Scotland Street. I blew for Scotland street and the next street which is hardly a block south of that with four blasts, winding up with the last blast as I was approaching Scotland Street. I did not blow four blasts for Scotland Street and the next street just before it, I blow the two streets together and sounded the last whistle just before we came to Scotland Street. I don't remember about a strong wind blowing that day from the Northwest.

A. R. WHITE, being duly sworn, deposed and testified as follows:

[fol. 93] I am A. R. White, an employee of the Atlantic Coast Line Railroad Company, and have been for 11 or 12 years. I was the fireman with Mr. Bassett at Dunedin when an accident occurred in which three people met their death. The train was going north. I was on the seat box on the left side of the engine. I was sitting on my side and I got down about 30 or 40 feet from the crossing and saw this car coming up about the same distance from the crossing and went right in front of the engine and I jumped up and hollered to him to put on the emergency. The words I hollered to him were, I told him to wait, we are hitting a car. From the time I first saw the automobile until the time of the crash it did not slow up or stop or change its

speed any. It seemed just about the same. Just ran right in front of us. Before we came into the first road crossing south of Dunedin the engineer turned on his air ringer, automatic bell ringer. And he blew for all these. There is 4 or 5 crossings and including the one the accident happened on. The automatic bell stopped after the accident happened. I got off the engine and went out front and noticed it ringing and went back to the engine and shut it off. There was a steam whistle on the train. There was not any air whistle. When the train entered Scotland street it was going about 10 or 15 miles an hour. I hollered to the engineer warning him of the danger when the engine was about 30 to 60 feet from the crossing. The engineer immediately applied the emergency brakes. The accident happened regardless.

Cross-examination:

I told the engineer when we were about 30 to 60 feet before we got to the crossing. I jumped off my seat box and he put on the emergency just as soon as I hollered. When I first saw the automobile, it was about the same distance that we were from the track. I couldn't tell whether the automobile was going to stop. It was going [fol. 94] between 10 and 15 miles an hour. I didn't say that he put the brakes 30 to 60 feet from the crossing. I said when I saw we were hitting the car I told him to put the emergency on. I saw the car first when we were 30 to 60 feet from the crossing. I told him just a few minutes before we hit. After the emergency was put on the train went about 160 to 170 feet. It went two car lengths and the engine and these cars is about 60 feet long and the engine is about 40 to 50 feet long. The engine went up just about this side of the loading platform up there about Main Street. The emergency stayed on till the time he put it on until the train came to a stand still. There was no little air whistle on the train. I do not remember exactly where I was when they turned on this bell ringing apparatus, but we were coming into Dunedin on the other side, because I would usually reach up and try the bell cord. He began to blow down about the water tank, some place along there. And he blew two long blasts and two short blasts. He blew the regular crossing blow more than one time. He didn't

blow just one time for all those crossings. You couldn't do that because you would have to back up and come again and blow it another one. I have never done that just to blow. There are three or four streets that run parallel to Scotland Street that the train crosses over before you get to Scotland Street where this accident took place. I don't mean to say that the engineer, before he reached each and every one of these crossings, he blew two long and two short blasts. When he did get through blowing the crossing blow he would start on another one. I do not mean to say for every crossing he blew two long blasts and two short ones. I didn't say he blew for each crossing. I said he blew the crossing blow from the time he started blowing, he would blow I guess he blowed two or three crossing blows, something like that, I couldn't tell you exactly. I [fol. 95] don't remember clearly about it. There are certain things that are brought to my mind clearly. After he blew two long and two short blows at the water tank, I couldn't tell you what the next kind of blowing that he did: I do not know exactly. He blew some more because I know the whistle was blowing down at the other crossing. That is the rules. We have to blow. Two longs and a short and a long. We did not blow for each one of the crossings that way. We go through them every day. I know we did it. I never paid any particular attention to the kind of wind that was blowing. I don't remember exactly what time we were due there but we were about on time. We left St. Petersburg at 5:30 and I suppose we were about on time. It was about 6:05 or 6:10.

Whereupon the deposition of Mrs. MABEL L. SEELEY, a witness on behalf of the defendant, was read to the Jury.

My name is Mabel L. Seeley, aged 60. I live at Kenmore, New York, and I have lived in New York for 37 years. I was in Dunedin, Florida, on March 9, 1931. I had been there about five weeks and had rented an apartment in Mrs. Smart's house on Scotland Street. I witnessed the accident that happened on March 9, 1931, about 6:00 o'clock P. M. at a point where Scotland street intersects the A. C. L. railroad when an accident occurred by reason of a collision with a train and an automobile in which accident Mr. Stringfellow was injured.

To the question:

Q. Please state in your own way where you were, what you were doing, what you heard and what you saw,

counsel for plaintiff objected upon the following grounds:

[fol. 96] Mr. Campbell: That question tends to elicit from the witness evidence tending to show and prove that the deceased was guilty of contributory negligence when this defense has not been pleaded and when contributory negligence has not affirmatively appeared from the evidence of the plaintiff; and also in the answer she attempts to testify to a state of facts tending to show that the deceased was guilty of contributory negligence when this defense has not been pleaded by the defendant and when contributory negligence has not affirmatively appeared from the evidence of the plaintiff, and when it has not been shown by undisputed testimony that the defendant was free from negligence.

The Court: Objection overruled. In a plea of general issue the defendant may show that the plaintiff's negligence was the proximate cause of the injury. There is no question of comparison here because it is not raised by the pleas.

To which ruling the plaintiff then and there excepted.

A. When I went to get supper that night I discovered that I did not have any sugar so I said I would go and get it and as I came down the stairs I heard the noise and so decided that I could not cross the crossing before it came along. I walked out on the street and took my time, just then I heard an automobile coming by me, looked and decided to let it pass before I crossed the street. It passed me and then I crossed slantedly to the other side, all of the time watching the automobile to see whether it stopped at the crossing or not. He slackened just a little and made one dash across the track. The train struck the automobile, carried it on the front of the engine as far as the loading platform at the station and then it tumbled over. The house or apartment in which I was stopping on Scot-
[fol. 97] land Street faced north. I am not a very good judge of distances but I would say this house was located a short city block west of the A. C. L. Railroad crossing.

There was no other house on the south side of Scotland Street between the house in which I was stopping and the railroad crossing except a cottage that was nearer to the tracks but it was back quite a little ways. It was not right out on the street. I first heard the approach of the train before I reached the street, in fact before I came out of the house. I cannot tell the kind of noise that I heard. The noise continued right up until the accident. I was proceeding east on my errand for sugar. I was on the south side of Scotland Street and then I crossed slantedly to the north side. I had proceeded eastward on the south side of Scotland Street about one half the distance from the house to the railroad tracks before I crossed to the north side. After I had crossed to the north side of Scotland Street I stood just before I stepped up on the curb and watched to see if he could make it or if he could not. There is a Stop sign in the middle of Scotland Street and west of the railroad track. A rubber tire with "stop". The driver of the automobile did not stop before he reached this side.

To the question and answer:

Q. State whether the driver of this automobile stopped from the time you first saw him until the happening of the accident,

A. He did not stop. He slackened his pace a little bit.

counsel for plaintiff objected upon the following grounds:

Mr. Campbell: That question tends to elicit from the witness evidence tending to show and prove that the deceased was guilty of contributory negligence when this defense has not been pleaded and when contributory negligence has [fol. 98] not affirmatively appeared from the evidence of the plaintiff; and also in the answer she attempts to testify to a state of facts tending to show that the deceased was guilty of contributory negligence when this defense has not been pleaded by the defendant and when contributory negligence has not affirmatively appeared from the evidence of the plaintiff, and when it has not been shown by undisputed testimony that the defendant was free from negligence.

Which objection was overruled by the Court, to which ruling the plaintiff then and there excepted.

From the point where I stopped near the north side of Scotland Street, I cannot tell in feet how great a distance I could see in a southerly direction along the railroad tracks. It was not as far as a long city block. I think about one half of a city block.

To the question and answer:

Q. State whether or not the driver of this automobile looked in the direction from which the train was coming; before he entered upon the tracks.

A. Yes, it appeared to me that he did. He looked towards the train and then made a dash right across.

the plaintiff made the same objection, which objection was overruled by the Court. To which ruling the plaintiff then and there made exception.

At the time he looked in that direction I saw the train. He had just passed me in the automobile at the time he looked.

To the question and answer:

Q. After he had looked in the direction from which the train was approaching, what, if anything, did he do?

[fol. 99] A. He seemed to speed up to cross the tracks.

the plaintiff made the same objection, which objection was overruled by the Court, to which ruling the plaintiff then and there excepted.

I cannot state approximately the speed of the automobile from the time I first saw it until the accident and I cannot state approximately the speed of the train from the time I first saw it until the time of the accident. I would say the speed of the train was the usual speed of trains passing through Dunedin and it seemed to slacken up for the depot.

And to the question and answer:

Q. State whether the automobile was going fast or slow when you first saw it.

A. It was going fast. It was a T Model Ford and it was rattling good.

the plaintiff made the same objection, which objection was overruled by the Court, to which ruling the plaintiff then and there excepted.

The weather at that time was sunshiny and warm. I did not see any persons other than the occupants of the automobile at or near the scene of the accident at the time it happened.

Cross-examination:

I saw the Stringfellow automobile before it was struck by the train. He did not stop or slacken up. I do not have any interest in this case. It is immaterial to me who wins the case. I gave a written statement of my testimony to the claim agent of the Railroad Company before I left Dunedin, Florida, in March 1931. And then I refused to answer questions sent me by Campbell & McLean, the plaintiff's attorneys, after I left Dunedin; I thought that long as I had given one statement, that was enough. I did [fol. 100] not get offended while I was in Dunedin because I was not asked to attend and testify as a witness at a Coroner's inquest over the bodies of Mr. Guy Stringfellow and his children, held shortly after he was killed. I offered to give my statement but was told that they would come and see me later. To tell the truth I did not know whether I should or should not give plaintiff's attorneys a statement of my testimony as long as I had offered to testify in Dunedin at the coroner's inquest and my offer was not accepted. I thought it was not wanted. I know Mrs. George Smart of Dunedin, Florida.

Q. Isn't it a fact that about 10 or 15 minutes after the Stringfellow car had been struck by the train that you were standing in the yard in front of Mr. George Smart's home on Scotland Street in Dunedin, Florida, where you had a room, and didn't you then and there say in substance to Mrs. George Smart: "I thought when Stringfellow saw the train, he drove up pretty close to the tracks and almost stopped, looked south and then north and then speeded ahead to cross. I thought he saw the train, but undoubtedly he did not?"

A. That conversation took place up by the railroad tracks and I will tell you what more I said: "He deliberately drove onto the railroad tracks," and I also stated that he slackened his car instead of stopping it.

I do not recall that I know Mr. Wilmer H. James of Dunedin. Yes, I told someone in the grocery store that I just saw a terrible wreck.

Q. And didn't you then and there tell Mr. Wilmer H. [fol. 101] James, in substance, that you were waiting at the crossing for the train to pass and that you heard Mr. Stringfellow's car approaching and that the car made a noise like it had stopped, and then the car drove onto the track and was struck by the train?

A. No, I did not say anything about the automobile stopping. I never said that to anyone. I did say that I heard the noise of the automobile.

O. C. Howell, being duly sworn, deposed and testified as follows:

My name is O. C. Howell. I have lived in Dunedin for the last 12 years. I have been a policeman there for the last two years. I was a policeman there in March, 1931, and I saw the accident. On this date it was my business to flag the Main Street crossing at this particular time. And along between, I guess about 6:00 or 6:15 o'clock in the afternoon, the train gets along there somewhere along that time, and I was leaving the drug store, between the drug store and the crossing and I heard this train blow, and I walked on up to the crossing and did not see it down the railroad track and walked on up toward the depot and by that time I could see it coming around the curve at the water tank about a mile away and I tapped on the window for the station agent that the train was coming and about that time it blew down there and I started walking back toward the crossing a distance of about thirty or forty or fifty feet, about as far as from here to the back end of the building here, and before I got to the crossing I stopped and looked down the track again, and the train had blowed one time and I could hear it blowing, it was not blowing so awfully loud because the wind was blowing out of the northwest pretty hard. I got on the crossing and was looking south on the railroad track and it was coming along up the railroad track, and about that time it got to this Scotland Street crossing an automobile and the train met about the same time, and the train dragged this automobile up [fol. 102] to the station platform, and I could see the man in the car and the little boy, and I couldn't see any more. When I first saw it, the automobile and the train struck about the same time. I did not see the automobile before

it entered the track because the loading platform cut off my view. I could see the bell ringing and I could hear it as well as see it. I couldn't tell how fast the train was approaching going over this crossing because it was coming right directly towards me. I know Mr. Stringfellow and had been knowing him about one and one-half years. He used to go over this particular crossing all together after he moved down in that section of town. I only saw him go across there once in the afternoon. I saw him as many as a dozen times, I guess.

Cross-examination:

The first whistle I heard was a steam whistle. After the train passed the water tank I heard a whistle of some kind. I could not swear positively it was a steam whistle. I took it to be an air whistle. The Scotland Street crossing is a much frequented street. Main Street is supposed to be the main thoroughfare. There was quite a few crossed down there at the Scotland Street crossing. Yes, I remember testifying at the Coroner's inquest the day after the accident. I think my recollection about the transaction was fresher then than it is now. It has been more than a year. I remember that a stenographer took the evidence down at the inquest. I remember seeing the Official Court Reporter there, Mr. Satterfield.

Q. I want to ask you if you recall this question being asked you by Mr. McLean:

Q. Do you know whether or not the bell of the engine was ringing at the time this accident occurred?

A. Yes sir.

Q. Did you say to him:

[fol. 103] "Well, he always rings the bell, but I won't say this particular time he was ringing it, but I have noticed him numbers and numbers of evenings, he always rings his bell and blows his whistle."

Q. You stated that, did you not?

A. Yes sir.

Q. The next question:

Q. You won't say positive about this particular instance?

A. I won't say positive about this particular instance, I don't remember.

Q. You told him that, did you not?

A. Something to that effect, yes sir.

Q. You don't deny saying that?

A. No sir.

Q. Do you recall Mr. McLean asking you this question on this same coroner's inquest—the coroner asked this question instead of Mr. McLean:

Q. Scotland Street, Mr. Oliver, did you hear the train whistle blow beyond the Scotland Street crossing?

A. Yes sir, the air whistle.

Q. Did you make that statement?

A. If I remember right, I did, yes sir.

Q. Air whistle?

A. Yes sir.

Q. Did you make that statement?

A. Yes sir.

Q. The next question:

Q. How far was that beyond Scotland Street?

A. Well, it was on and off all of the way from where it came into Herring Street until it got up to the depot there.

Q. You made that statement, did you?

A. Yes sir.

Q. The next question:

[fol. 104] Q. And the train had blown its whistle previous to that?

A. The big whistle, the steam whistle.

Q. That is what I said. It blew its big whistle before it got to Scotland Street, and then after the big whistle blew then it blew its air whistle?

A. Yes. It hardly ever blows the steam whistle, but about once unless someone is waving down to stop, about once after he leaves the water tank down there.

A. Yes sir.

Q. This question was asked you:

Q. Are you sure whether the air whistle blew just between Scotland Street and the street south?

A. Well, he blows every evening because I flag that train every evening and he never has missed blowing that whistle no time.

Q. You made that statement, did you?
A. Yes sir.

Q. Well, do you remember about this particular case?
A. Yes, he blew it in this particular case. The wind was blowing and if you were not paying close attention you might not hear the whistle blow. The wind was blowing from the other way, blowing out of the west.
Q. And you could hear the air whistle at the street?
A. If you were standing out in the open you could hear it, yes sir.

Q. That is true, is it not?
A. Yes sir.

Mr. Campbell: Now I want you to listen particularly to this question. This was asked you by Mr. McLean at the Coroner's inquest:

Q. You did not hear the steam whistle blow after it got on this side of the water tank, north of the water tank?
[fol. 105] A. No sir.

Q. That is true, is it not?
A. It blew this side of the water tank.
Q. Then this statement is not correct about it.
A. Well, I heard the whistle blow between the station and the water tank.
Q. Do you remember this question being asked you by Mr. McLean?

Q. And did you not hear the steam whistle blow after it got on this side of the water tank, that is north of the water tank?

The Court: He is not asking you what the truth about the matter is, but whether you testified to that at that time.

Mr. Campbell:

Q. Mr. McLean asked you that question, did he not?
A. I don't remember whether he did or not.
Q. The Answer here is: "No sir", that is that it did not blow. Did you make that statement?
A. I don't remember.

E. H. BALDWIN, being duly sworn, deposed and testified as follows:

My name is E. H. Baldwin. I have lived in Dunedin, Florida, about 7 years. I am an electric acetylene welder. On March 9, 1931, I saw this accident. I was walking down Scotland Street just across Broadway, going east on the north side of the street, when this fellow came down Broadway and turned to the left going east on Scotland Street towards the railroad track and I seen him there and was watching him go up the railroad track. Of course, I don't believe he saw the train. He just drove right in front of the train and the train hit him. As well as I could tell he did not slow up or stop from the time I first saw him. I couldn't see that distance, whether he slowed up or not, but [fol. 106] I don't think he did. I heard the whistle and the bell ring. I heard the train coming up the track, I guess one-fourth of a mile down the tracks there. I was about 150 feet west from Broadway.

Cross-examination:

I was west of Broadway about 450 feet from the railroad. There was not a thing in the world between me and the railroad tracks except the car. There was not a soul in the world with me. I was not paying very much attention to the car until it got pretty close to the railroad track. I could see the back of the car. I know he slackened the speed of his car some, but not very much. I knew who was in the car. I saw them when they were on the track. He was on the same side of the street driving that I was. I was going up the left hand side. It was a sedan car. I could not see the train until it got to the crossing, but I could hear it. The first whistle I heard blow away down the track was a steam whistle. The next whistle I heard was a steam whistle. I did not hear any air whistle. I could not tell you how many times it blowed. But it blowed there, I imagine three times, that is just saying off hand. It was not over four blasts of the whistle. I don't imagine there was. I don't know where the train was when I first heard it because I couldn't see it. I could just hear it coming. It was a very windy day.

ROY OUTING (colored), being duly sworn, deposed and testified as follows:

My name is Roy Outing. I have lived in Dunedin five [fol. 107] years. I was there on March 9, 1931, about six o'clock at the railroad crossing, right where the accident happened at. I went to carry a little boy to see the train. I heard the whistle of the train that was coming and I went with this little boy. I just seen the train and the automobile hit. It was coming just when I was on this side (east) of the track. The car was coming from this (west) way, and I was on this (east) side of the train coming (north) this way. I saw the automobile before it got to the track, just as it made the turn coming up by the Bank from the Times office. From the time I first saw it up until the time of the collision, the automobile did not stop. It did not slacken up before it went up on the track. I heard the bell on the train ringing when it came up to the next street.

Cross-examination:

When I first heard the big steam whistle the train was down by the section house, about a mile below there, towards Clearwater. The water tank is right at the section house. That is not the last time I heard the big steam whistle blowing. I heard it blow the last time up there at the street. I don't know the name of the street. The street I was on was Scotland Street. The next street is Elbert Street, and the next street down below, I don't know its name. The last time the train blew the big steam whistle, [fol. 108] it was down about Elbert Street, that is one street below Albert Street. From Elbert Street to Scotland Street the big steam whistle didn't blow. I didn't hear anything but the bell ring. I was standing right at the switch in the northeast corner of Scotland Street and the Railroad crossing. I did not see Mr. Stringfellow slow up his speed and look both ways on this crossing. When he seen the train he was right on the tracks and he went to cut off and the train hit him right off the crossing. A little boy was with him on the front seat. I didn't notice where the little girl was. When I found her she was in a box in a crate in the automobile that had some groceries in it, on the back seat. All I heard that the train was doing was the bell ringing.

J. O. HILL, being duly sworn, deposed and testified as follows:

My name is J. O. Hill. I live at Dunedin, Florida. I am a station porter at the Atlantic Coast Line station and was such on March 9, 1931. At the time this accident happened, I was right in front of the depot. I saw the train coming and the car was approaching and they were both running about the same speed. The car might have been going a little faster and the train running, I would judge, about 15 miles an hour and the car was just entering upon the crossing, as near as I could tell from where I was when the train struck it. I saw the automobile before it entered the track about 20 feet west of the track. From the time I first saw it until the time of the accident the automobile did not slow up and stop. I did not see the automobile at any time stop before the accident. I was out there to put the mail on the train and was about 4 feet from the track where I generally am when I throw the mail on. I throw the mail on and they throw it off. The train did slow up for that purpose. The [fol. 109] bell was ringing. I heard it and could see it.

Cross-examination:

I have been working for the Atlantic Coast Line Railroad Company nearly six years and I am still with them. I was on the south side of Main Street and about 20 feet from where the train stopped, and the automobile was taken off the front of the engine. The engine came from Scotland Street to within 20 feet of Main Street where I was standing with the automobile pinned up in front of it. I don't know just what the distance is from Scotland Street up to Main Street. It must be about 325 feet. I heard the whistle and the bell. When I first heard it it was about one-half a mile away or more. I was inside the depot at the time I first heard it and I came immediately outside. I do not recall how many times I heard it blow after that. It blowed several times. I would say five or more. The whistle continually blew. I don't know if it was an air whistle or not. I heard the whistle blowing. I could not say if it was an air whistle or a steam whistle. I think I testified before the Coroner's inquest on the 10th day of March of last year, the day after it happened, but I understand since then that there was not an air whistle. On the

day after this took place I said it was an air whistle that I heard.

Mr. Campbell:

Q. Did you not state at the Coroner's inquest to this question, this answer:

A. He was blowing his air whistle. I don't believe I heard him blow the steam whistle after he passed the water tank.

Q. You made that statement, did you?
A. I don't think so.
Q. Do you not remember that this evidence was stenographically reported by an official court reporter there?

[fol. 110] The Court: You had better translate that.

Mr. Campbell:

Q. Was not this question asked you:

Q. But he was blowing the air whistle?
A. Yes sir.

Q. Did you make that statement?
A. I might have.
Q. You do not deny that, do you?
A. No, sir.

C. A. WINDHAM, being duly sworn, deposed and testified as follows:

My name is C. A. Windham. I live at Lakeland, Florida. I am an employee of the Atlantic Coast Line and have been for about 24 years as conductor and baggage master. On the date of the happening of this accident at Dunedin on March 9, 1931, I was on the train that was involved in this accident, on duty as baggage master. When I felt the air brakes go on and the emergency, I was standing in the door at the time and looking out and saw that they were dragging some object, and I climbed down the side step on the side of the car and before the train came to a full stop I was on the ground and on my way to the engine to see what

had happened. Before the train entered Scotland Street, it was going about 10, possibly 12 miles an hour. The whistle sounded, I would judge, about the time the engine entered this street. There were four blasts of the whistle sounded. I judge he started back possibly three or four hundred feet for the first blast. He had sounded at the other crossings before that. I could not say whether the bell was run when we struck the car but it was ringing after the train stopped.

Cross-examination:

I did not say positively that the whistle began to blow several crossings back. I was standing in the door with [fol. 111] the mail pouch in my hand. I had no reason to remember the number of whistles and the place where they were blown, but I can not help but hear them. I was not looking for an accident but we almost always know when the road crossings are being sounded. We get so used to it. When you are riding in the first car back of the engine you can not help but notice it. In going from Clearwater up to this town we cross quite a few street crossings. I don't believe there is any street real close to Scotland Street that I remember. I don't believe I remember any real close by on the south side. I don't know whether there is a street between the water tank and Scotland Street. In a way it is my business to be on the lookout at streets. We are always on the lookout for safety at all times. Before we entered Scotland Street, I recall distinctly that the crossing signal was sounded. I could not say how many distinct blasts there were from the water tank up to Scotland Street. There was one long and two shorts but the long sounded for this particular crossing. I would judge that we were just about going on Scotland Street when the last one sounded. I did not say it was just exactly at the same time the emergency brakes were on. When I heard the blast of the locomotive it was pretty close to the same time.

J. O. Hill, being recalled, further testified as follows:

I was on the witness stand yesterday. At the instance of counsel for defendant, I measured the distance from the Scotland Street crossing to the platform of the depot. I

measured 273 feet. My duties were to take the off-coming mail and place the on-going mail on the train. I perform that duty about 20 or 25 feet north of the platform.

Cross-examination:

I made this measurement yesterday afternoon from the north curb of Scotland street. Scotland Street is 20 feet wide. On the date of the accident preparatory to putting the mail on the train I was right out from the depot door [fol. 112] about 25 or something like that feet north of the platform. I was not in the street.

J. T. HODGES, being duly sworn as a witness for the defendant, testified as follows:

I am James T. Hodges. I am an employee of the Atlantic Coast Line Railroad Company and have been for about 33 years. The past 10 years I was road foreman of engines. Prior to that time I was locomotive engineer. I am pretty well acquainted with the characteristic condition of the tracks of the Atlantic Coast Line running through Dunedin. If there is any material changes in grade crossings, I am not. But I ran an engine over the track for a number of years. As to the grade and the tangent of the track there, I am. In the past, in my years of experience, I have made several tests as to what trains will do, with trains of different braking power and train resistance. I am familiar with train 132, engine No. 1503. Assuming a train going north equipped as that train was, so far as the engine was concerned, seven cars, baggage car, mail coach and day coach, and the rest Pullman cars, going at a rate of speed over the crossing or about the crossing just south of Dunedin station at the rate of twelve to fifteen miles an hour, the best distance that the train could be stopped in, using the quickest means to stop the train by putting it into emergency, I judge, would to 250 to 350 feet. You know there is a variation in there that could not be overcome because one train one day with the same brake equipment might stop in 200 feet and maybe 250 feet tomorrow. Taking the same train under the same conditions going 35 miles an hour, it could be stopped from

450 to 500 feet by using emergency, somewhere in that neighborhood. There might be a little variation in there as to distance.

Cross-examination:

I am familiar with the equipment of this engine. It [fol. 113] had a steam whistle on it. I couldn't tell you whether that particular engine was equipped with an air whistle or not at that time, as it is now. If the rails are dry and it was a sun-shiny day, that would have something to do with the space it would take the engine to stop when you put it in emergency and if you put sand on it it will still stop quicker. I assume that in this case that they put sand on the track and that the train was going 12 to 15 miles an hour. These cars are 120,000 to 150,000 pounds apiece, anywhere from 60 to 75 tons. You have seven of them and there is a 200 ton engine and you have to take into consideration all of the resistance that you have got to develop and put it to the rail to retard the movement of that train, and in moving that train 12 or 15 miles an hour you are lucky to stop it at 250 to 350 feet. 100 feet variation due to the fact that you will take the same train in ideal conditions today and you will put the emergency on at the same second at the same place and it will run 250 feet and under the same conditions tomorrow it may run 350 feet with the same equipment. Theoretically there is sixty per cent resistance. In an empty car the brakes are within about sixty per cent, and when the car is loaded the brake resistance goes down as low as fifteen per cent on some cars. The more people you put in a car the more resistance you would have.

W. T. McIlvaine, being duly sworn, deposed and testified as follows:

My name is W. T. McIlvaine. I am a conductor on the Atlantic Coast Line Railroad and have been for 31 years. I was the conductor on the train that was involved in this accident. The number of the engine was 1503. I did not see the automobile before it collided. At the time of the accident I was in the car right next to the engine. In my opinion the rate of speed the train was being operated at

at the time this train entered, or about the time it entered [fol. 114] Scotland Street, was between 10 and 12 or 13 miles an hour. As the train proceeded into Dunedin he blew the whistle and rang the bell. I could hear that.

Cross-examination:

As he approached the vicinity of Dunedin he blew the whistle and rang the bell at the crossing. There are two crossings before Scotland Street. He was ringing the bell when he blew for the station and just as he got pretty close to the first crossing he blew that road crossing and the bell was ringing. When he got to the first crossing after he passed the water tank, he blew the long whistle, I think I heard the big whistle blow just as we came to the other crossing at Albert Street. I heard it blow. I have no doubt in the world about it. I recall it blowing at each and every street. I watched it close. When the emergency brakes were applied he had got to the Scotland Street crossing and had put on a slight application of brakes. We were expecting to stop there and pick up a sack of mail. We did not come to a full stop. We would merely slow down at the depot and the mail was thrown on. This train never stops there until it is flagged, unless we have a passenger to put on. It only stops if somebody is getting on the train or we have somebody out of St. Petersburg. I have been running regular on this particular train for something over a year and I think the train was going between 10 and 12 miles an hour. I did not say it could not have been over 13. I heard the brakes going on and thought we would get a passenger and went out and opened the door of the first class car; when the brakes went on the front of the engine was just over that crossing. He hadn't put the brakes on. The brakes went on good and the engine stopped about at the loading platform. I was in a combination baggage and passenger car. The first car back of the tender. The next car was a standard coach and the next Pullman, and the next dining car, and the next four cars Pullman cars, making seven cars in all.

[fol. 115] Whereupon the defendant rested.

Thereupon the plaintiff, further to maintain the issues on her behalf, in rebuttal, produced the following evidence:

Mrs. George Smart, being duly sworn as a witness for plaintiff in rebuttal, testified as follows:

My name is Mrs. George Smart. I remember the evening of March 9, 1932. Mrs. Mabel Seeley had an apartment at my home. I was at home the day of the accident at the Scotland Street crossing. I heard the train when it passed the Scotland Street crossing. It is 181 feet from the corner of my house up to the railroad. I had a conversation with Mrs. Mabel L. Seeley 10 of 15 minutes after this accident, in my front yard.

Counsel for plaintiff then asked the witness the following question:

Q. Did Mrs. Seeley say to you:

"I thought Mr. Stringfellow saw the train. He drove up pretty close to the track and almost stopped, looked south and then north and then speeded ahead to cross; I thought he saw the train, but undoubtedly he did not."

A. That is the very words she told me.

Cross-examination:

I know both Mrs. Stringfellow and her husband. They rented a place from me. They were in arrears some for their rent.

Thereupon the plaintiff, further to maintain the issues [fol. 116] on her behalf and with the consent of the Court and the counsel for the defendant, produced and offered the following evidence in chief:

Harry Lishness, being recalled, testified as follows:

I was familar with the condition of the Scotland Street crossing before the bushes were cut on or near the right of way. Looking down the railroad tracks while standing at the stop signal on the west side of the track on Scotland Street, before these bushes were cut, I could see down the railroad tracks about 65 feet. From Albert Street to the

warehouse where I testified I was sitting at the time the accident occurred, is 33 paces of just ordinary steps. From that window to the Scotland Street crossing it is 89 steps.

(No cross-examination.)

W. H. JAMES, being duly sworn, deposed and testified as follows:

My name is W. H. James. I live in Dunedin and own a grocery store. I know Mrs. Mabel L. Seeley. On the afternoon of the Stringfellow accident on the 9th day of March, 1931, Mrs. Seeley came in the store. I had a conversation with her and she said: "I just saw a terrible wreck."

Whereupon counsel for plaintiff asked the witness the following question:

Q. Did she not say in substance that she was waiting at the crossing and that she heard the Stringfellow car approaching and that the car made a noise like it stopped and then the car drove onto the track and was struck by the train? Did she say that?

A. Yes.

(No cross-examination.)

[fol. 117] Thereupon three photographs, plaintiff's exhibits 6, 7 and 8, were admitted in evidence without objection as a correct portrayal of the permanent physical conditions that existed at the time of the accident. (These exhibits ordered transmitted in connection with the transcript.)

Mrs. CRYSTAL TOWNE, being recalled, testified as follows:

I drive an automobile and have driven on parallel streets with the railroad tracks and in making trips, I often notice the speed of trains in comparison with the speedometer on my car, and in that way, I have had an opportunity to judge the speed of trains. In my opinion, when I saw the

train at Scotland Street, that caused this accident, it was running between forty and fifty miles an hour.

(No cross-examination.)

[fol. 118] Whereupon the plaintiff rested.

(Both parties having concluded and submitted their evidence, thereupon, in the absence of the Jury, the defendant made the following Motion:)

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Barton: If your honor please, at the conclusion of all of the evidence in the case, the defendant now moves the Court to direct a verdict for the defendant upon the grounds: That there is no evidence upon which a verdict could be predicated, particularly speaking of the Guy Stringfellow case, for his death, in that there is no evidence of any negligent act which could have been the proximate cause or was the proximate cause of this injury; Second, it is shown by the undisputed evidence that the proximate cause of this injury, directing the Court's attention to the proximate cause not contributory negligence, that the proximate cause of this injury was the failure of the driver of the vehicle to take the necessary precaution or any precaution to determine whether or not the train was approaching, the evidence conclusively showing that he drove up there and raced with the train and tried to beat it and unfortunately lost. It is not worth while to take time to call your Honor's attention to the many cases.

RULING ON MOTION FOR DIRECTED VERDICT

The Court: Gentlemen, between the Supreme Court of the United States and the Circuit Court of Appeals and the Supreme Court of Florida, they have got the judge between the devil and the deep blue sea. The Supreme Court of the United States says that failure to stop, look and listen is negligence. In a case that went up from Ohio, they said that would defeat any recovery. Now the Circuit Court of Appeals, after that decision was rendered, have held that in Florida under this Apportionment statute that it would not necessarily defeat a recovery, and I

think that it is the better rule where the evidence shows that the proximate cause of the injury was the negligence of the railroad and that failure to stop, look and listen was only contributory; but if the failure to stop, look and listen is the ultimate cause, then I am satisfied that there can be no recovery. The evidence is practically undisputed and overwhelming that this automobile did not stop. [fol. 119] Whether the man looked and listened does not appear but if he did look he did not look to any purpose. There is some talk about the Ford rattling. The probabilities are that the Ford was rattling so that he could not hear anything; that is simply speculation. I cannot put my decision of that. So we come back to the question as to whether the railroad company was negligent.

The Supreme Court of the United States has held that a Georgia statute of which our Florida statute is an exact copy as far as I am advised—I never sat down and compared them—but the statute which casts the presumption of negligence on the railroad company, is unconstitutional and void in the Georgia case.

Now I understand that the Court of Appeals has upheld the Florida statute on account of the different construction given to the statute by the courts of Florida and the courts of Georgia. The courts in Georgia let the presumption go to the jury as evidence to be weighed in connection with the evidence given to rebut the presumption whereas the Florida court holds that it just merely shifts the burden and has no evidentuary effect at all. If the evidence is not produced to overcome the presumption the presumption stays there but where the evidence is produced to overcome the presumption it loses all of its effect.

Now the Supreme Court has repeatedly held that the court must justify all of the evidence and when you take all of the evidence and consider it as a whole with all reasonable and logical deductions that can be drawn therefrom, a verdict of the jury could not be sustained, it is the duty of the court to direct a verdict.

Now the plaintiff proves enough here to cast the burden on the defendant, and the defendant produced evidence that the bell was rung and the whistle was blown and produced evidence as to a very reasonable rate of speed. Some of the plaintiff's witnesses swore that they heard a whistle. And all that you have to rebut that is the evidence offered

[fol. 120] by the plaintiff, the three witnesses who put this train running from about around fifty and sixty miles an hour and one or two that they did not hear the bell. Now that testimony that put it up around fifty or sixty miles an hour just shows that they did not know what they were talking about. If they had put it above thirty they would not know what they are talking about. They stretched it too much; they overreached themselves.

I am clearly of the opinion, taking the evidence as a whole, that the railroad company has carried the burden which is cast upon it to disprove the negligence. I am under my oath as judge to decide one way or the other as it appears to me. I cannot see that there is any negligence here upon the part of the railroad, and that it in any way contributed to this unfortunate accident, therefore you may prepare a verdict in each one of the cases.

Mr. Barton: I desire, of course, to make the same motion for each of the cases.

The Court: Yes. Contributory negligence is not pleaded and could not be pleaded as to the children anyway. The court is of the opinion that the railroad company has overcome the presumption.

Exception was noted by the plaintiff to the ruling of the Court and to the peremptory instruction.

Thereupon the jury returned into court and the Court instructed them as follows:

The Court: GENTLEMEN OF THE JURY, I hope you have been having a better time than I have. You were relieved from listening to the argument for a while and I had to listen to it.

In this court the judge is required to assume some re-[fol. 121] sponsibility. He is not a mere referee of a fair fight to sit up here and let the jury pass upon the questions and the court has decided that under all of the evidence here as a matter of law that neither of these plaintiffs could recover against the railroad company. This is an unfortunate accident, we all sympathize with the widow, but there are certain rules of law that control these matters and the court is responsible for the administration of these rules of law and you are not, consequently I direct some one of your number to sign a verdict of not guilty in

each one of these cases. That relieves you of all responsibility.

ORDER APPROVING BILL OF EXCEPTIONS

Inasmuch as the ruling and exceptions specified in the foregoing bill does not appear in the record of said cause, I Alexander Akerman, Judge of said Court who presided at the trial thereof, after due notice given the defendant herein, have settled and signed the bill and have ordered that the same be made a part of the record of said cause this 20 day of April, A. D. 1932.

Alexander Akerman, Judge.

The foregoing bill of exceptions approved.

Bussey, Mann & Barton, by McKinney Barton, Attorneys for Defendants.

[fol. 122] IN UNITED STATES DISTRICT COURT

No. 2730, No. 2731, No. 2732, No. 2733, No. 2734

[Title omitted]

[fol. 123] ORDER TO TRANSMIT PHOTOGRAPHIC EXHIBITS—April 20, 1932

It appearing to the Court that it is proper and necessary that all photographs introduced in evidence in the above causes, referred to in the evidence and the bill of exceptions as plaintiff's exhibits numbered 2, 3, 4, 5, 6, 7 and 8, and as defendant's exhibits, numbered A. B, C. D, E and F, should be inspected by the United States Circuit Court of Appeals as a part of the record herein.

It is therefore ordered that the said exhibits be transmitted by the Clerk of said Court in original form in connection with the statement of evidence in the bill of exceptions.

Done and ordered at Tampa, Florida, this the 20th day of April, A. D. 1932.

Alexander Akerman, Judge.

[fols. 124-127] Citation, in usual form, showing service on James R. Bussey et al., filed April 20, 1932, omitted in printing.

[fol. 128] IN UNITED STATES DISTRICT COURT

No. 2730; No. 2731, No. 2732, No. 2733, No. 2734

[Title omitted]

[fol. 129] PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed April 20, 1932

To the Clerk of the aforesaid court:

You are requested to make transcript of record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit pursuant to an appeal allowed in the above entitled causes, and to include in such transcript of record the following, and no other, papers, in each of the above causes:

1. Amended Declaration.
2. Plea.
3. Verdict of the Jury.
4. Final Judgment.
5. Order Extending time and term of Court for purpose of filing bill of exception.
6. Bill of Exceptions.
7. Order Directing Clerk to transmit photographic exhibits.
8. Petition for Appeal.
9. Assignment of Errors.
10. Order allowing Appeal.
11. Order allowing Appeal forma pauperis.
12. Citation with the Acceptance of Service.
13. These Directions with Acceptance of Service.

Doyle Campbell, Wm. C. McLean, Attorneys for Appellant.

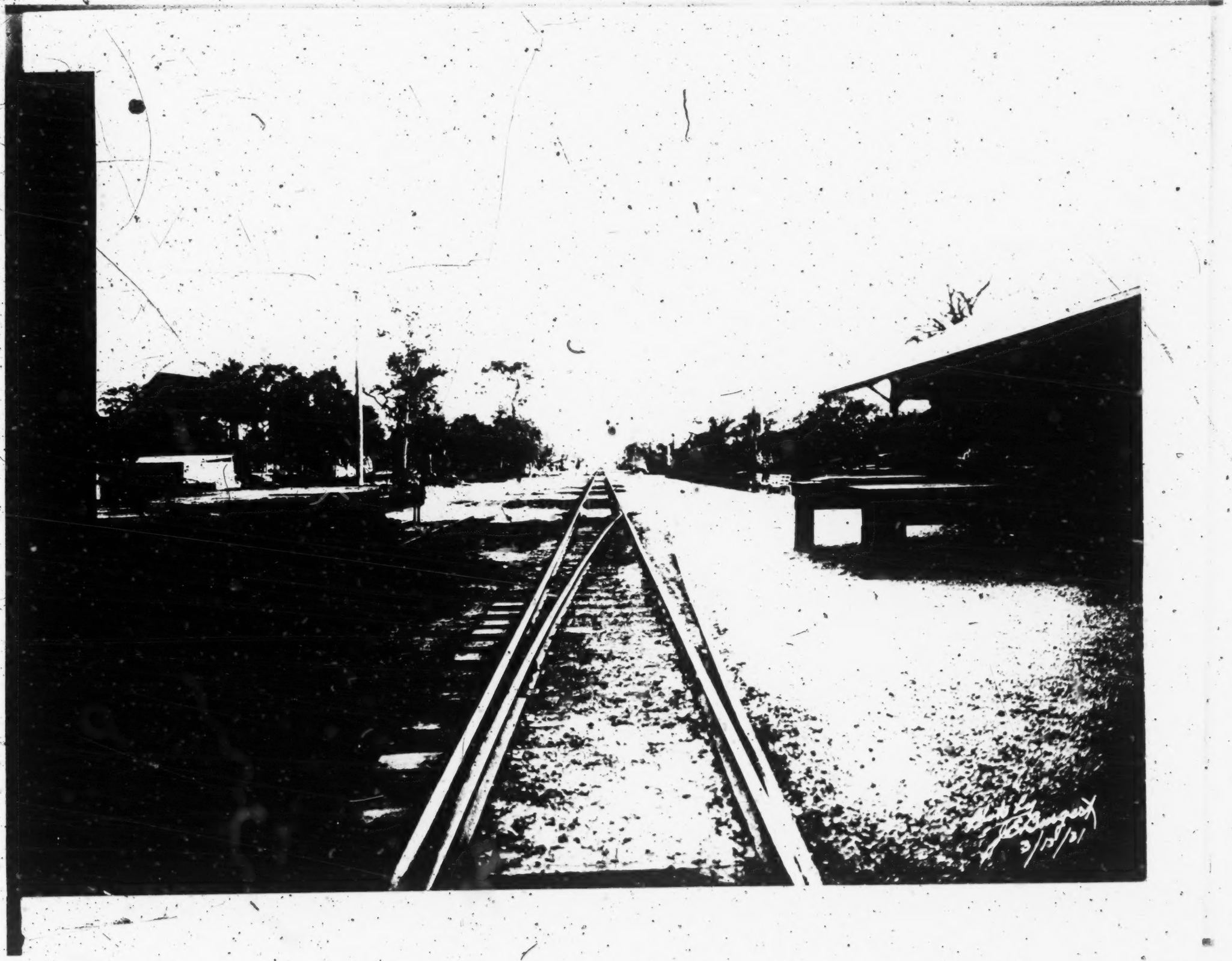
We hereby accept service of a copy of the foregoing directions this the 20th day of April, A. D. 1932.

Bussey, Mann & Barton, by McKinney Barton, Attorneys for Appellee.

[fols. 130 & 131] Clerk's certificate to foregoing transcript omitted in printing.

(Here follow photographs, marked 131a to 131m, inc.)

RAIL
CROSSING



Camera 40 ft. from center of crossing
Photo by
E. Burgert
3/11/31

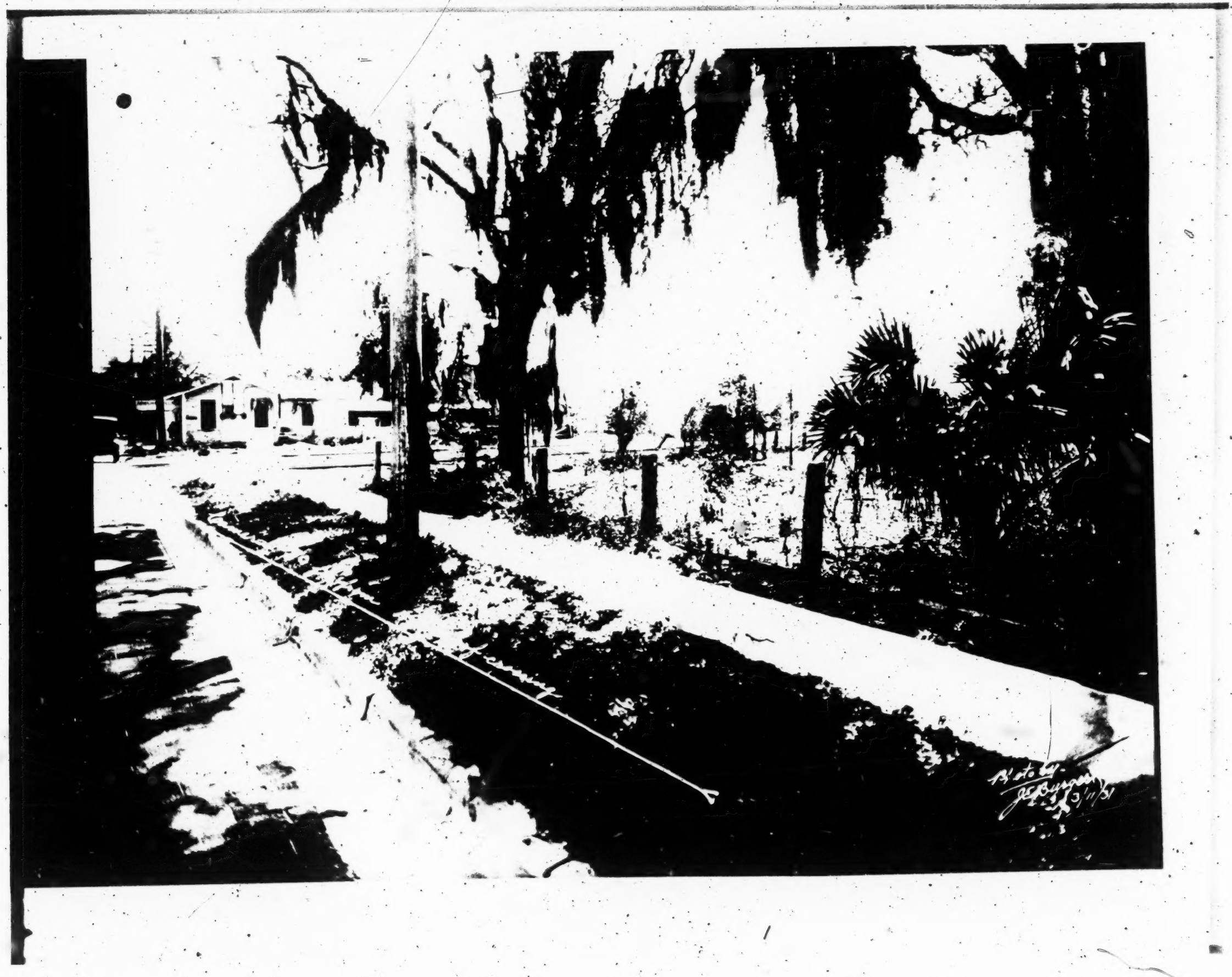


Photo by
3/11/51

CROSSING
ROAD
ATLANTIC COAST LINE
3 TRACKS

MAR-10-1931
SUNSET CAMERA SHOP
BY ATREN

[fol. 132] Minute entry of argument and submission, March 2, 1933, omitted in printing.

[fol. 133] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6617

SARAH ELIZABETH STRINGFELLOW, a Widow, and as Administratrix, etc., Appellant,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Appellee

In Forma Pauperis

Appeal from the District Court of the United States for the Southern District of Florida

Before Bryan, Sibley, and Hutcheson, Circuit Judges

OPINION—Filed March 31, 1933

BRYAN, Circuit Judge:

Appellant, in her own right as widow and as administratrix, brought separate actions, which were consolidated for trial, against the appellee railroad company for negli- [fol. 134] gently running its train upon and fatally injuring her husband and two minor children at a street crossing in the town of Dunedin, Florida. Negligence was alleged (1) in failing to give warning of the approach of the train by sounding the whistle or ringing the bell of the engine, and (2) in running the train upon the street crossing at a dangerous rate of speed. Appellee pleaded not guilty and at the close of all the evidence the trial court directed a verdict in its favor upon the ground that the injuries complained of were caused solely by the negligence of appellant's husband. Appellant contends in support of her assignments that it was error to take the case away from the jury.

The accident, which resulted in the injuries alleged, occurred in the daytime at a grade crossing where Scotland

street intersects the railroad right-of-way at right angles, the street extending east and west and the right-of-way north and south. On the right-of-way the main line was flanked on either side by a side track. To the south of the crossing the main line was straight for half a mile or more, but the view in that direction of one going east on the street was cut off by trees until the west side track, within 20 feet of the main line, was reached, at which point the view to the south was open and unobstructed. At the time of the accident appellant's husband was driving his automobile, in which his children, one seven, and the other nine, years of age, were riding with him, toward the east across the intersection; and the train was coming from the south. The train was a few minutes late, and was not due to stop at Dunedin. A strong wind from the northwest interfered with the hearing of any one at the crossing who might be listening for the rumble of the train, or for any warning that might have been given by whistle or bell. The evidence was in hopeless conflict as to whether the whistle [fol. 135] was sounded or the bell was rung, and also as to the speed of the train. Several witnesses for appellant who were near the place of the accident and in position to hear testified that they heard no whistle or bell; and they gave various estimates of the rate of speed, ranging from 30 to 50 miles per hour. Two of these witnesses cited as evidence of their ability to estimate speed speedometer tests which they said they had made, while traveling by automobile on highways parallel with railroad tracks, of the speed of trains going in the same direction as they were. On the other hand witnesses for appellee, particularly the engineer, fireman and members of the train crew, testified that as the train approached Scotland street the last of four blasts of the whistle was sounded, and that the bell was being rung by an automatic ringer from the time the train reached the fourth street south of Scotland street until after the accident. Members of the train crew also testified that the train had slackened speed as it passed through Dunedin, and that it was running at a rate not exceeding 10 or 12 miles per hour as it approached Scotland street. The fireman testified that he saw appellant's husband drive upon the crossing about 60 feet in front of the engine, and that he called to the engineer who immediately put on the emergency brakes. The engineer testified that

he did not see the automobile because it approached from the west and he was on the east side of the engine, but that he applied the emergency brakes as soon as the fireman called out to him and stopped the train as quickly as was possible. The engine proceeded about 100 yards north of Scotland street before it was brought to a standstill. Several witnesses for appellee testified that appellant's husband drove across the intersection at a speed of 10 to 15 miles per hour; but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train.

[fol. 136] Compiled General Laws of Florida provide:

"A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." § 7051.

"No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." § 7052.

It is plain that under § 7051 a prima facie case was made out. It is appellee's contention that the presumption of its negligence, which arose under that section, upon proof of the injuries as alleged, was overcome by further proof which disclosed that those injuries were caused solely by the negligence of the injured persons, and that the case presented is not one which calls for the application of the rule prescribed in § 7052 for apportionment of damages, because no fault was attributable to it. Of course appellant could not recover for the death of any party who could not if living have recovered damages because of his injury. In so far as the case depends upon appellant's right to recover for the death of her husband, we are of opinion that it was not error to direct a verdict for appellee. Her hus-

band as driver of the automobile was under the duty of exercising the care and caution which a reasonably prudent man would have displayed under the same or similar cir-
[fol. 137] cumstances. It therefore was his duty to use his senses of sight and hearing before undertaking to cross the railroad tracks. If when he had passed the trees and had an open view down the track he had looked he would have seen the train and could have avoided the collision. A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching train. Notwithstanding § 7052 he could not have recovered for an injury, and so recovery cannot he had on account of his death. S. A. L. Ry. v. Tomberlin, 70 Fla. 435; Egley v. S. A. L. Ry., 84 Fla. 147; A. C. L. R. R. Co. v. Gornto, 89 Fla 97; F. E. C. Ry. v. Davis, 96 Fla. 171; Covington v. S. A. L. Ry., 99 Fla. 1102; Southern Ry. Co. v. Mann, — Fla. —, 108 Sou. 889 In our opinion the right of recovery for the deaths of the children should have been submitted to the jury. The children were guilty of no negligence; and their father's negligence could not be imputed to them. The judgment is defended as to them only on the theory that the father's negligence was the sole proximate cause of their deaths. But the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company. There was substantial evidence, tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run the train through a populous community without warning, or at a speed so great that it could not be stopped within less than 100 yards; especially if because of a strong headwind it was made difficult for those using the street intersection to hear a train approach-
[fol. 138] ing from the south. It is true that in Covington v. S. A. L. Ry., supra, a case somewhat similar to this, the Supreme Court of Florida held that the failure of the driver of the automobile to stop at the crossing for an approaching train was such negligence as precluded recovery

of damages by his nine-year old son who was also riding in the automobile. But the driver in that case could have seen the train at a distance of 75 feet from the crossing, whereas in this case the view was much more limited. Besides, there it was fairly inferable from the pleadings and the evidence that the driver actually saw the train, while here it was open for the jury to find that appellant's husband did not know or realize that a train was approaching. It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing. The Covington case does not purport in any wise to limit or overrule the earlier case of S. A. L. Ry. v. Watson, 94 Fla. 571, where it was said: "There may be concurrent causes of a single injury—concurrent negligence of two separate and distinct agencies—which, operating contemporaneously, together constitute the efficient proximate cause of the injury inflicted, and without either one of which the harm would not have been done." The just quoted language was used in a case in which the plaintiff was suing to recover damages for an injury which she sustained, in rejecting a contention that the negligence of plaintiff's husband, who was driving an automobile in which she was riding, was the sole proximate cause of a collision between the automobile and a train at a highway crossing. That appellee, upon evidence adduced by appellant, could have been held by the jury to be liable, is conclusively established, as it seems to us, by the Supreme Court of the United States. In Little v. Hackett, 116 U. S. 366, a passenger in a hired carriage was injured when the driver negligently turned his horses upon a railroad crossing without taking the precaution to ascertain that a train [fol. 139] was coming. The railroad company was held liable to the passenger because of its concurrent negligence in failing to give signals of its approach, or to have a flagman on duty. In disposing of that branch of the case the Court said: "The evidence tended to show that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage—of the managers of the train in not giving the usual signals of its approach by ringing a bell and blowing a whistle, and in not having a flagman on duty; and of the driver of the carriage in turning the horses upon the track without

proper precautions to ascertain whether the train was coming." In Kreigh v. Westinghouse & Co., 214 U. S. 249, it was held that it was a question for the jury to determine whether the operation of a defective derrick was not attributable to faults of construction and equipment, for which the master would be liable, as well as to negligent handling by plaintiff's fellow servants. Our conclusion is that the jury would have been warranted by the evidence in finding that appellee was liable in damages to appellant for the deaths of her children.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

IN UNITED STATES CIRCUIT COURT OF APPEALS

SEPARATE OPINION OF HUTCHESON, CIRCUIT JUDGE—Filed March 31, 1933

I concur with the majority in their conclusion that "the right of recovery for the deaths of plaintiff's children [fol. 140] should have been submitted to the jury". I concur with them in the reasons advanced in support of that conclusion, that the evidence did not establish, as matter of law, that "their father's negligence was the sole proximate cause of their deaths. That the jury might reasonably have concluded that their deaths were caused by the contributing or concurrent negligence of their father and the railroad company." Because I do concur in these conclusions and their supporting reasons, I am compelled to dissent from the other conclusion of the majority, that the evidence makes a case under which, as matter of law, there could be no recovery for the death of plaintiff's husband. I not only think this conclusion is logically indefensible, but I think that it can be demonstrated that it is equally opposed to the words of the Florida statutes and to the meaning and effect given to those words by the Florida decisions.

By the words of Sec. 7051 of the Florida statutes quoted in the majority opinion, the burden in crossing accidents is on railway companies to show absence of negligence on their part. By the words of Sec. 7052 of the Florida stat-

utes, also quoted, where the plaintiff shows that the negligence or consent of the complainant is the sole cause of the injury, defendant's burden is fully sustained, and no recovery may be had. Where it shows no more than that complainant and defendant are both at fault, its burden is only partially sustained, and the plaintiff, though his damages are diminished by the amount of his fault, may still recover.

I cannot find within the ambit of the statutory words, any support for the conclusion of the majority, that though the negligence of the driver is not the sole proximate cause, but only a concurring or contributing cause of the injury, the degree of his contributory negligence may be so much greater than that of defendant as to completely bar his [fol. 141] recovery. The statutes of Arkansas expressly provide that contributory negligence shall not prevent recovery when it is of less degree than defendant's negligence. Sec. 8575 Crawford & Moses' Digest; Bradley vs. Mo. Pacific R. R., 288 Fed. 496. While in Georgia by construction the courts have imposed this meaning on a statute having the same words as the Florida statute. Lamb vs. McAfee, 90 S. E. 105. This rule, however, does not obtain in Florida. In Atlantic Coast Line Ry. vs. Watkins, 121 So. 95, where recovery was allowed, the court said: "While we think that both the company and its engineer were at fault in the lack of reasonable prudence, the degree of recklessness and lack of prudence shown by Mr. Watkins (for whose death plaintiff sued) was vastly greater."

I have carefully examined the Florida decisions from the beginning. They have without varying held, as to crossing accidents, that where both plaintiff and defendant are legally negligent, that is, where the negligence of each proximately contributes or concurs to produce the injury, plaintiff and those in the vehicle with him may recover without regard to the amount or degree of fault of the plaintiff. That where plaintiff's negligence is the sole proximate cause of the injury, neither the plaintiff nor any of those in the vehicle with him may recover, for the reason that in that case defendant has rebutted the presumption of negligence cast on it by the statute and shown itself free from fault.

Every decision cited by the majority bases on Atlantic Coast Line Ry. vs. Miller, 44 So. 249. Back of it are two

decisions to the same effect. In an attempted demonstration of this position, I shall set out brief extracts from the cases, italicizing the controlling words.

"The proofs show conclusively, that the injury to the plaintiff on this occasion resulted *solely and entirely* from [fol. 142] her own reckless, careless and negligent act of attempting to cross the track immediately in front of a moving locomotive. * * * Under these circumstances she is by law not entitled to recover from the railroad company for the injuries so received. * * * *There is no evidence of any negligence* on the part of the defendant company *that was the contributing cause of,* or *contributed to, the bringing about of* the injury to the plaintiff. On the other hand the evidence showed affirmatively that *it was not guilty of any negligence that contributed to the production* of any injury to plaintiff, but the plaintiff's own testimony showed that the accident and injury to her resulted *solely from her own recklessness and imprudence.* Seaboard Air Line Ry. Co. vs. Barwick, 41 So. 71.

"*In order to the recovery of damages negligence of the railroad company must have existed and must have been the proximate cause of the injury,* for if the heedlessness or lack of prudence of the party injured *was the sole proximate cause of the injury, he cannot recover damages however negligent the railroad company might otherwise have been.*" Seaboard Air Line Ry. Co. vs. Smith, 43 So. 240.

"Under our statute the defendant railroad company is liable for all injury to persons and property caused by the running of its engines and cars, unless the company shall show that it has used all ordinary care and diligence upon the occasion to avoid or prevent the injury. *There was no carelessness or negligence on the part of defendant shown or proven by the plaintiff that contributed to the bringing about of the injury, and the unshaken and uncontradicted* [fol. 143] *evidence for the defense affirmatively showed that no such negligence was attributable to the defendant, but that the deceased brought down the shocking accident upon himself solely by his careless driving upon the defendant's railway track* immediately in front of a rapidly approaching train, of whose presence he must have known, that was too close upon him when he first got upon the track to be stopped by any known human agency, without

coming in violent collision with him." Atlantic Coast Line Ry. vs. Miller, 44 So. 249.

"Conceding that the plaintiff's own testimony *shows negligence on her part, as there was some evidence tending to show negligence in the fireman, the case should have been submitted to the jury to determine the liability of the defendant, if any, and if damages are allowed, to diminish them in proportion to the amount of default attributable to plaintiff.*" Johnson vs. L. & N., 52 So. 197.

"The imprudence of the plaintiff in heedlessly riding his motorcycle directly in front of an approaching train * * * exhibited a lack of prudence which the known risks demanded he should exercise. The engineer had the right to presume * * * that he would not attempt to cross the track ahead of the train with such a narrow margin of time to accomplish it. Under such circumstances, the speed of the train could not be considered *the proximate cause of the injury.* Atlantic Coast Line Ry. vs. Miller, 44 So. 247." S. A. L. vs. Tomberlin, 70 So. 347.

"The negligence of the plaintiff in *undertaking to cross the track under the circumstances was very great. It would not be wrong to say it amounted to heedlessness. We think* [fol. 144] *that such heedlessness or lack of prudence amounting to a positive disregard of danger was the sole proximate cause of the injury.*" L. & N. Ry. vs. Padgett, 70 So. 999.

"The immediate cause of the injury was the choking down of plaintiff's engine causing his car to stop on the railroad track. With that the railroad had nothing to do and in no way contributed to it. * * * If the engine of the automobile had not choked down when it got on the track, the accident would not have occurred. This was the proximate cause of the accident and the railroad was not guilty of negligence in not guarding against the possibility of the automobile breaking down when crossing its track." L. & N. vs. Harrison, 83 So. 89.

In Egley vs. S. A. L. Ry. Co., 84 Fla. 147, the judgment of the court was "affirmed on the authority of S. A. L. vs. Tomberlin, 70 So. 437; L. & N. vs. Padgett, 70 So. 998."

In A. C. L. Ry. vs. Gornto, 89 Fla. 99, the judgment was "reversed upon authority of" the Egley, Padgett and Tomberlin cases.

"It seems clear that the injury was caused by the plaintiff's own negligence, since if they had looked down the track they would have seen the train before going so near the track that the injury was inevitable * * * *Had there been negligence of the defendant railroad company in operating its train as alleged, which appreciably contributed to causing the injury, the defendant would be liable for damages under the statute, even though negligence of the plaintiff also proximately contributed to the injury.*" Florida East Coast Ry. vs. Davis, 117 So. 844.

[fol. 145] "*By the well established rule of this court, the record not only exhibits that degree of flagrant carelessness on the part of plaintiff as would bar recovery, but we think it meets and rebuts the presumption of negligence cast on defendant by the law.*" Southern Ry. vs. Mann, 108 So. 890.

"*Although the plaintiff was not under the evidence chargeable with the contributory negligence of her husband, yet if he was negligent in driving the automobile upon the track in front of the approaching railroad cars, and this negligence on his part was the sole proximate cause of the collision, plaintiff could not recover.*". S. A. L. Ry. vs. Watson, 113 So. 719.

Three late Florida cases, collecting up, analyzing and stating the rule of the Florida cases in accordance with this view, are Germak vs. Florida East Coast Ry., 117 So. 391; Atlantic Coast Line R. Co. vs. Watkins, 121 So. 95; Covington vs. S. A. L. Ry., 99 Fla. 1102. In the Germak case, the court, because of the Florida statute, refused to follow the rule of the Goodman case. It declared that the effect of the Florida statute is

"If it appears that the injury was caused solely by the negligence of the party injured, there can be no recovery, and if both the injured and the employees of the company were at fault in causing the injury, there may be a recovery but the damages will be reduced in proportion to the contributory negligence of the injured party."

The Watkins case, a case in my opinion undistinguishable from this, was a suit by a widow for the death of her husband in a crossing accident. The statute was re-examined in the light of the authorities, and it was held that though

[fol. 146] the evidence showed that the degree "of recklessness and lack of prudence shown by plaintiff's decedent" was "vastly greater" than the negligence of the defendant, plaintiff could recover, her damages however, to be greatly diminished because of that fault.

In Covington vs. S. A. L. Ry., 99 Fla. 1105, the Supreme Court held that a child injured in a crossing accident while in a car which his father was driving, was not entitled to recover, because his father's negligence was the sole proximate cause of the injury. It approved the language of the District Judge—"There can be no doubt of these facts, and how could it be possible that any negligent act of the defendant contributed to the injury, I cannot see." While in his concurring opinion Brown, J. said:

"The evidence so strongly preponderated to sustain the plea that the collision and injury was *due solely to the negligence of the father*, that this court would not be authorized in holding the lower court in error in granting the motion for new trial."

In Claughton vs. Atlantic Coast Ry., 47 Fed. (2) 679, this court correctly announced and applied the Florida rule that while the sole negligence of a driver is a bar to recovery for a crossing injury, contributory negligence is not. Such negligence bars neither the driver nor those in the vehicle with him. It merely diminishes the amount of the recovery of those negligent or responsible for the negligence. Bradley vs. Mo. Pac. Ry., 288 Fed. 484.

The opinion of the majority advances a third view as maintainable in Florida, that there are degrees of contributory negligence, and that a driver may be so contributorily negligent as that though the recovery of those in the car with him will not be barred because his negligence is not [fol. 147] the sole but a concurring proximate cause of the injury, his own recovery will be.

I find no warrant in the Florida statute nor in any of its decisions, for this view. I think it overrules the Claughton case. I respectfully dissent from it.

[fol. 148] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 6617

SARAH ELIZABETH STRINGFELLOW, a Widow, and as Administratrix, etc.,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation

JUDGMENT—March 31, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Atlantic Coast Line Railroad Company, a corporation, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, concurs in part and dissents in part."

[fol. 149] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6617

[Title omitted]

MOTION OF APPELLANT FOR SEVERANCE—Filed April 13, 1933

And now comes the appellant in the above styled cause, by her undersigned solicitor, and shows unto the court as follows:

1. That the appellant in her own right as a widow and as administratrix brought five separate actions in the United

States District Court for the Southern District of Florida, Tampa Division, against the appellee, Atlantic Coast Line Railroad Company (Tr. pp. 3, 15, 26, 37, 48).

2. That the District Court of its own motion directed the Clerk of said Court to enter an order consolidating all of said causes for trial (Tr. 77).

3. That in each of said cases separate verdicts and separate judgments were entered (Tr. 6-64).

4. That in each of said cases the appellant and plaintiff took a separate appeal to this Court (Tr. 68-71).

[fol. 150] 5. That an appeal in each of said cases was taken to this court on a single transcript and docketed in this court and argued as one case and were by this court, on the 31st day of March, 1933, disposed of by a single written opinion.

6. The appellant Sarah Elizabeth Stringfellow a widow, plaintiff in the court below in case No. 2733 (Tr. 37-46) in her own right as widow seeking to recover damages against the appellee and defendant for the death of her husband, Guy Stringfellow, conceiving herself aggrieved by the decision and opinion of this court, entered herein on the 31st day of March, 1933, and desires to file a petition for a re-hearing only insofar as said decision affects the case herein specifically referred to in this paragraph and in the event such re-hearing be denied to file in the Supreme Court of the United States a petition for a writ of certiorari to this court.

7. That the rights of the appellants in each of the four remaining cases are so separate from the rights of the appellant, Sarah Elizabeth Stringfellow, a widow, in her own right seeking damages for the death of her husband, Guy Stringfellow, Case No. 2733 (Tr. 37-46) that she is entitled to a severance in said case from the remaining appellants for the purpose of filing a petition for a re-hearing and/or a writ of certiorari.

Wherefore the appellant, Sarah Elizabeth Stringfellow, a widow, respectfully moves the court that an Order of Severance be entered to permit the appellant to file a separate petition for re-hearing and/or a petition for a writ of

certiorari in her cause of action and appeal wherein she seeks to recover damages for the death of her husband, Guy Stringfellow.

(Signed) Wm. C. McLean, Solicitor for Sarah Elizabeth Stringfellow, a Widow, Appellant.

[fol. 151] The appellant, Sarah Elizabeth Stringfellow, a widow, and as administratrix in all of the four remaining cases, same being Nos. 2730, 2731, 2732 and 2734, by her undersigned counsel, hereby waives notice of the above motion and consents to an order of severance as therein above prayed for.

(Signed) Wm. C. McLean, Solicitor for Sarah Elizabeth Stringfellow, a Widow and as Administratrix.

[fol. 152] State of Florida,
County of Hillsborough:

I hereby certify That on this 11th day of April, 1933, personally appeared before me the undersigned authority in and for said County and State, Wm. C. McLean, who being by me first duly sworn deposes and says, that he did on the 11th day of April, 1933, mail a true and correct copy of the attached and foregoing Motion for an Order Allowing a Severance, to Bussey, Mann & Barton, Esqs., St. Petersburg, Florida, Attorneys for the Appellee in the foregoing cause, by United States Mail, postage prepaid.

(Signed) Wm. C. McLean.

Sworn to and subscribed before me this the 11th day of April, 1933. (Signed) Joseph F. Miyares, Notary Public, State of Florida at Large. (Seal.)

[fol. 153] [File endorsement omitted]

In United States Circuit Court of Appeals for the Fifth Circuit

[Title omitted]

Petition of Appellant for Rehearing—Filed April 17, 1933

The undersigned, your petitioner, in her own right as widow, plaintiff in Case No. 2733 in the District Court, and

one of the appellants in the above styled cause, respectfully submits that she has been aggrieved by an opinion of Your Honors rendered herein on the 31st day of March, 1933, insofar as the same affects her action against the appellee for the injury and death of her husband, in the respects hereinafter set forth, and prays for a re-hearing of said matter insofar as her separate action is concerned, specifying the following grounds to be relied upon:

1. The failure of Guy Stringfellow to exercise "the care and caution which a reasonably prudent man would have displayed" does not bar a recovery under Section 7052, Compiled General Laws of Florida, 1927, when it appears from the holding of the Court that the jury could reasonably have found that the railroad company also failed to exercise "all ordinary and reasonable care and diligence" [fol. 154] by running its train "through a populous community without warning or at a speed so great that it could not have been stopped within less than 100 yards; especially if because of a strong head wind it was made difficult for those using the street intersection to hear a train approaching from the south."

2. Under the holding of the prevailing opinion negligence of the railroad company could reasonably have been found by the jury to have contributed in some degree to the death of Guy Stringfellow to warrant a verdict for appellant under Section 7052, Compiled General Laws of Florida, 1927.

3. It is for the jury to say whether the defendant company "exercised all ordinary and reasonable care and diligence" necessary to relieve it from liability under Section 7051 and 7052, Compiled General Laws of Florida, 1927, where there was evidence tending to prove that the defendant company ran its train through a populous community without warning, or at a negligent and dangerous rate of speed.

4. It would appear from the opinion of the Court entered on the 31st day of March, 1933, that its conclusion and judgment is based upon a construction of Section 7052 Compiled General Laws of Florida, 1927, in conflict with and contrary to the decisions of the Supreme Court of the

State of Florida construing said statute in the following recent cases:

Seaboard Air Line Railway Company v. Watson, 137 So. 719 (Decided November 12, 1931); Appeal dismissed November 7, 1930, — U. S. —, 77 L. Ed. 68;

Florida East Coast Railway Co. v. Townsend, 140 So. 196, 198; 142 So. 909; 143 So. 445.

5. The prevailing opinion of the Court is contrary to [fol. 155] and in conflict with the former opinion of this Court construing Section 7052 Compiled General Laws of Florida, 1927, in the case of:

Claughton v. Atlantic Coast Line Railroad Co., 47 Fed. (2) 679.

Wherefore petitioner respectfully urges that a rehearing may be granted her in her action for the death of her husband; and that the mandate of this Court in that action may be stayed pending the disposition of this petition.

Respectfully submitted.

Sarah Elizabeth Stringfellow, by Wm. C. McLean, Her Attorney.

I, Wm. C. McLean, of Tampa, Hillsborough County, Florida, an attorney regu-*ra*ly admitted to practice in the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that in my opinion the foregoing petition for re-hearing in the case of Sarah Elizabeth Stringfellow, a widow, v. Atlantic Coast Line Railroad Company, a corporation, embraced in No. 6617, is well founded in point of law and that the same is not presented for the purpose of creating a delay.

This the 14th day of April, A. D. 1933.

Wm. C. McLean.

STATE OF FLORIDA,
County of Hillsborough:

I hereby certify that on this 14th day of April, 1933, before me, the undersigned authority in and for said State [fol. 156] and County, personally appeared Wm. C. McLean, who being by me first duly sworn, deposes and says that he did on the 14th day of April, A. D. 1933 forward

a true and correct copy of the above and foregoing petition for re-hearing by United States mail, postage prepaid, to Messrs. Bussey, Mann & Barton, attorneys at Law, St. Petersburg, Florida, attorneys for appellee.

Wm. C. McLean.

Sworn to and subscribed before me this the 14th day of April, 1933. Claribel S. Hicks, Notary Public, State of Florida at Large. (Seal of Claribel S. Hicks, Notary Public, State of Florida at Large.)

[fol. 157] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION OF APPELLEE FOR REHEARING—Filed April 18, 1933

To the United States Circuit Court of Appeals for the Fifth Circuit and the judges thereof:

The Atlantic Coast Line Railroad Company, a corporation, appellee, above named, believing that this Court in [fol. 158] its opinion and decision filed March 31, 1933, reversing and remanding said cause, has, by apparent mistake, overlooked and failed to consider certain material facts conclusively shown in the record, and the law pertaining thereto, prays that a rehearing of said matters be granted and ordered by the Court, upon the grounds hereinafter stated:

(1) On page 3 of the printed decision of this Court, it is said:

"The fireman testified that he saw appellant's husband drive upon the crossing about sixty feet in front of the engine, and that he called to the engineer who immediately put on the emergency brakes."

This is erroneous in that the fireman testified as follows:

"I was sitting on my side and I got down about thirty or forty feet from the crossing and saw this car coming up about the same distance from the crossing and went right

in front of the engine, and I jumped up and hollered to him to put on the emergency."

"I hollered to the engineer, warning him of the danger when the engine was about thirty to sixty feet from the crossing."

Again, on cross-examination, the witness testified:

"I told the engineer when we were about thirty to sixty feet before we got to the crossing. * * * When I first saw the automobile, it was about the same distance that we were from the track. I couldn't tell whether the automobile was going to stop."

(Record, page 93.)

[fol. 159] In other words, this witness testified that when he, the fireman, was between thirty and sixty feet from the point where the accident happened, he saw this automobile coming, and it was about the same distance, to-wit, thirty to sixty feet from the point of the accident. No witness testified that the automobile was on the crossing sixty feet in front of the engine.

(2) On page 3 of the printed decision of the Court, it is said:

"but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train."

There is not a line of evidence that he stopped.

The plaintiff introduced one person, who claimed to be an eye witness, a Mrs. Crystal Towne, who said she was about 150 feet from the railroad track, and says that she saw the train strike the car (Record, page 86). This witness did not state, even by any inference, that the automobile stopped, or that she saw it, other than at the very moment of the collision.

The other eyewitnesses were—Mrs. Mabel Seeley, who testified that he did not stop, but that he slackened his speed a little, and he then speeded up across the tracks (Record, pages 97-98).

E. H. Baldwin testified, on direct examination, that he drove right in front of the train, and that as well as he can

tell he did not slow up, or stop, from the time he first saw him. On cross examination, he testified:

"I know he slackened the speed of his car some, but not very much."

(Record, pages 105-106.)

[fol. 160] Ray Outman, a negro, and an eyewitness, testified that he saw the automobile before it got to the track, and that it did not stop or slacken its speed before it went upon the track (Record, page 107).

The fireman, A. R. White, testified that from the time he first saw the automobile until the time of the crash, it did not slow up, or stop, or change its speed any (Record, page 93).

Therefore, it cannot be said to be uncertain as to whether or not he stopped. The evidence is uncontradicted that he did not stop.

(3) On page 4, of the printed decision, it is said:

"It is appellee's contention that the presumption of its negligence, * * * was overcome by further proof which disclosed that those injuries were caused solely by the negligence of the injured persons."

The appellee's contention was not that the injuries were caused by the negligence of the injured persons, which we take to mean all of the injured persons, but was solely the result of the negligence of the driver of the car.

(4) On page 6, of the printed decision of this Court, it is said, in differentiating the case of Covington against the Seaboard Air Line Railroad, that:

"It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing."

The plaintiff introduced one witness, as before stated, who saw only the actual impact, but the defendant introduced a witness, Mabel L. Seeley, who testified with respect thereto as follows:

[fol. 161] "There is a stop sign in the middle of Scotland Street to the west of the railroad track. * * * He did not stop. He slackened his pace a little bit."

She was then asked:

"Q. State whether or not the driver of this automobile looked in the direction from which the train was coming, before he entered upon the tracks.

A. Yes, it appeared to me that he did. He looked toward the train and then made a dash right across.

Q. After he looked in the direction from which the train was approaching, what, if anything, did he do?

A. He seemed to speed up to cross the tracks."

(Record, pages 97-98.)

And this testimony was corroborated, in part at least, by the witnesses, White and Outman.

It is true, no witnesses testified in exact words that he was racing with the train, but every logical deduction to be gathered from this testimony is that he was so doing, because "he looked toward the train and then speeded up." Of course, he is charged with having seen what was there, and from the fact that he speeded up, it is clearly inferable that he saw the train and was, in fact, racing. Certainly the facts of racing with a train in this case more clearly appeared than in the Covington case.

(5) The Court evidently overlooked the fact that all of the parties met death in the same accident, and if the negligence of the father was the sole proximate cause of his death, it must, likewise, be the sole proximate cause of the death of the children.

[fol. 162] (6) In the dissenting opinion of Mr. Justice Hutcheson, on page 14 of the printed decision, it is said:

"The opinion of the majority advances a third view as maintainable in Florida, that there are degrees of contributory negligence, and that a driver may be so contributorily negligent as that though the recovery of those in the car with him will not be barred because his negligence is not the sole but a concurring proximate cause of the injury, his own recovery will be."

We do not understand the majority take this position. It is our view from the opinion, that in so far as the driver's case is concerned no recovery could be had, because his negligence was the sole proximate cause of the injury. The

cases cited in the majority opinion, on page five (5) of the printed decision, as sustaining their view, were all cases dealing with sole proximate cause and not contributory negligence.

If it was meant to announce what Mr. Justice Hutcheson is pleased to term a "third view," as maintainable in Florida, then it must be upon the assumption that Section 7052 of the Compiled General Laws of Florida for 1927, as construed in the case of Atlantic Coast Line Railroad Company v. Watkins, 121 Southern, page 95, cannot be regarded as relating merely to practice or to a form or mode of proceeding, but is part of the substantive law and "cuts deep into the right observed at common law," and also that the question involved is not controlled by the federal statute with respect to "Laws of States or Rules of Decision" (U. S. C., Title 28, Paragraph 725).

This construction or holding, it would appear, is amply [fol. 163] justified by the opinion of Mr. Chief Justice Hughes, rendered in the case of Herron v. Southern Pacific, 283 U. S. 92, 75 Law Ed. 857. However, it would appear from the opinion of the majority of the Court, in discussing Section 7052 of the Compiled General Laws of Florida for 1927, that the Court did not so hold.

(7) The position of appellee was, and is, that the evidence shows that this accident was the result of negligence of the driver of the vehicle, which was the sole proximate cause, and, being the sole proximate cause of the accident, the death of all the parties resulting therefrom is barred, and that, therefore, the action of the lower court in all respects should be affirmed.

It is respectfully prayed and submitted that this petition to rehear should be granted and an allowance of reargument had—in view of the divergent views of the parties and the Court.

James R. Bussey, Sam H. Mann, Jr., McKinney Barton, Attorneys for Appellee.

I, McKinney Barton, one of the counsel for the above-named appellee, do hereby certify that the foregoing peti-

tion for a rehearing of this cause is presented in good faith and not for delay.

McKinney Barton, of Counsel for Appellee.

[fol. 164] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

OPPOSITION OF APPELLEE TO MOTION FOR SEVERANCE—Filed April 19, 1933

Comes now the Appellee in the above-entitled cause, Atlantic Coast Line Railroad Company, by its undersigned solicitors, and in opposition to the motion of the Appellant for an order of severance herein, says:

1. It admits the averments contained in Paragraphs 1, 2, 3, 4, and 5 of said motion.

6. In answering paragraph 6 of said motion the Appellee herein has prepared and has this day filed its petition to rehear in accordance with the Rules of this Court, and can see no reason why the Appellant, Sarah Elizabeth Stringfellow, widow, plaintiff in cause No. 2733, if she so desires, may not, likewise, file a petition for rehearing, insofar as her rights are affected, without an order of severance.

This Appellant will have no objection to the granting of an order of severance after the petitions to rehear have been acted upon by this Honorable Court, but is — the opinion that such severance should not be had until the Court does act upon such petitions. This appellee, to be entirely frank with the Court, is of the honest opinion that the cases should be affirmed as a whole or reversed as a whole, and if the Court, upon rehearing, should take this course, there can be no necessity for an order of severance, and for such an order to be entered at this time before the Court acts upon the petitions to rehear might cause either, or both, the [fol. 165] Appellee and Appellant to prepare and file two separate petitions for Certiorari to the Supreme Court of the United States, as intimated in Appellant's motion. Therefore, Appellee prays the Court that said motion for

severance be reserved by the Court until said petitions are filed and acted upon by the Court, or at least until the expiration of the time in which said parties have, under the Rules of this Court, to file such petitions.

7. Answering Paragraph 7 of said motion, Appellee admits that the rights of the Appellant in each of the four remaining cases are separate from the rights of Sarah Elizabeth Stringfellow, a widow, in her own right seeking damages for the death of her husband, Guy Stringfellow, Case No. 2733, but denies at this time that she is entitled to a severance of the case wherein she seeks to recover damages for the death of her husband.

Wherefore appellee prays the Court that said order of severance be denied at this time, or at least the action of the Court be reserved until the filing by the parties and the acting upon by the court of the Petitions to Rehear.

Respectfully submitted.

Jas. R. Bussey, Sam H. Mann, Jr., McKinney Barton, Solicitors for Appellee, the Atlantic Coast Line Railroad Company.

[fol. 166] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER GRANTING MOTION OF APPELLANT FOR SEVERANCE—April 21, 1933

Now on this 21st day of April, 1933, this cause came on to be heard upon the motion of Sarah Elizabeth Stringfellow, a widow, appellant in case No. 2733 wherein she seeks in her own right as widow to recover damages for the death of her husband, Guy Stringfellow, for an Order of Severance in said cause, and upon consideration thereof

It is found by the Court that appellant in the remaining causes has waived notice of said motion and has consented thereto, and

It is further found that Sarah Elizabeth Stringfellow, a widow, in Case No. 2733, has indicated her desire to file a petition in the Supreme Court of the United States for a

writ of certiorari to this Court; and that she is entitled to a severance from her co-appellants in this cause;

It is further found that the rights of appellant, Sarah Elizabeth Stringfellow, a widow, in her own right as widow seeking to recover damages against the appellee, Atlantic Coast Line Railroad Company, for the death of her husband, Guy Stringfellow, are so separate from the rights of her co-appellants that

It is therefore ordered that she be and she is hereby granted a severance from all of her co-appellants for the purpose of filing a petition in the Supreme Court of the United States for a writ of certiorari.

[fol. 167] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING OF APPELLANT—April 21, 1933

As neither of the judges who concurred in the judgment of the court in the above numbered and entitled cause is of opinion that appellant's petition for rehearing should be granted, it is ordered that the said petition be and the same hereby is denied.

[fol. 168] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING OF APPELLEE—April 21, 1933

It is ordered by the Court that appellee's petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 169] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

MOTION FOR STAY OF MANDATE—Filed April 27, 1933

Now comes Sarah Elizabeth Stringfellow, a widow, one of the appellants in the above entitled cause, plaintiff in

Case No. 2733 in the District Court wherein she seeks damages against the appellee for the death of her husband, and respectfully moves this Honorable Court to stay the mandate in the above entitled action insofar as the same affects her said suit as widow for the death of her husband and not permit the same to be issued out of said cause until the further order of the court, on the ground and for the reason that appellant in her own right as widow as aforesaid expects and intends in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on writ of certiorari of the decision and judgment rendered in favor of appellee and against the appellant, as widow, as aforesaid, in the above entitled action; and

[fol. 170] Appellant as widow as aforesaid, further shows to the Court that she expects and intends, in good faith, to file such petition for a writ of certiorari in forma pauperis in accordance with the statute in such cases made and provided.

Appellant further shows to the court that this Honorable Court did on the 21st day of April, 1933, enter an order granting appellant as widow as aforesaid, an order of severance in said cause from all of her co-appellants for the purpose of filing a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore appellant, as widow as aforesaid, prays that the court make and enter an appropriate order herein staying the issuance of the mandate in the above entitled action insofar as the same affects her separate action as widow for the death of her husband, until the further order of the court.

(Signed) Wm. C. McLean, Attorney for Sarah Elizabeth Stringfellow.

The undersigned, as attorneys of record for the Atlantic Coast Line Railroad Company, a corporation, appellee in the above and foregoing cause, do hereby acknowledge service of a copy of the above and foregoing motion and consent thereto.

This the 25th day of April, 1933.

(Signed) Jas. R. Bussey, Sam H. Mann, Jr., McKinney Barton.

[fol. 171] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE

On consideration of the application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 27th day of April, 1933.

(Signed) N. P. Bryan, United States Circuit Judge.

[fol. 172] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION TO STAY MANDATE—Filed April 27, 1933

Comes now the Appellee above named, and respectfully moves this Honorable Court to stay the mandate in the above-entitled consolidated action and not permit the same to be issued out of said cause until the further order of the [fol. 173] Court, on the ground and for the reason that appellee expects and intends, in good faith, within the time allowed by law, to apply to the Supreme Court of the

United States of America by petition for a review on writ of certiorari — the decision and judgment rendered in favor of appellant and against appellee in the above-entitled action; and

Appellee further shows to the Court that it is ready, able and willing to make a good and sufficient bond, conditioned as provided by law, in said cause.

Wherefore appellee prays that the court make and enter an appropriate order herein staying the issuance of the mandate in the above-entitled action until the further order of the court, and that the court fix the amount of the bond required of appellee, and that it be given a reasonable time in which to make, execute and file said bond.

(Signed) Jas. R. Bussey, Sam H. Mann, Jr., McKinney Barton, Attorneys for Appellee, Atlantic Coast Line Railroad Company.

STATE OF FLORIDA,
County of Hillsborough, ss:

We, Campbell & McLean, attorneys for Appellant, in the above-entitled cause, hereby acknowledge receipt of copies of the above said motion and enter our consent to the entry of an order as prayed for in said motion.

(Signed) Wm. C. McLean, Doyle Campbell, Attorneys for Appellant.

[fol. 174] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE

On consideration of the application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the

certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 27th day of April, 1933.

(Signed) N. P. Bryan, United States Circuit Judge.

[fol. 175] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 71

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 95

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U.
FILED
MAY 15 1933
CHARLES ELMORE CROP
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 71

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WM. C. MCLEAN,
Tampa, Florida,
Attorney for Petitioner.

INDEX.

Subject Index

	Page
Petition for writ of certiorari:	
Caption	1
Judgments below	1
Questions presented	1
Statutes involved	2
Statement	2
Rulings of the courts below	5
Reasons for granting the petition	8
Brief in support of petition:	
Opinions below	11
Jurisdiction	11
The facts	11
Argument	11
I. Conflict of decisions	11
II. Specifications of errors	12
III. Statement of law advanced	16
Conclusion	17

Authorities Cited.

Atlantic Coast Line R. R. Co. v. Watkins, 97 Fla. 350, 121 So. 195	13
A. C. L. Ry. Co. v. Weir, 63 Fla. 69, 58 So. 641, 41 L. R. A. (N. S.) 307, Ann. Cas. 1914A, 126	15
B. & O. R. R. Co. v. Goodman, 275 U. S. 66, 48 S. Ct. 24, 72 Law Ed. 167	13, 16
Claughton v. Atlantic Coast Line Ry. Co., 47 Fed. (2d) 679	15, 16
Davis v. Cain, 86 Fla. 18, 97 So. 305	15
Florida East Coast Ry. Co. v. Townsend (decided February 26, 1932), 140 So. 196, 198	9, 12
Germak v. Florida East Coast Ry. Co., 95 Fla. 991, 117 So. 391, 392	13, 16
Louisville & Nashville Ry. Co. v. Harrison, 84 Fla. 479, 94 So. 382	13
L. & N. Ry. Co. v. Norton, 75 Fla. 597, 78 So. 982	15
S. A. L. Ry. Co. v. Callan, 73 Fla. 688, 74 So. 798	15
S. A. L. Ry. Co. v. Myrick, 91 Fla. 918, 109 So. 193	14
S. A. L. Ry. Co. v. Tomberlin, 70 Fla. 435, 70 So. 437	14

Page

S. A. L. Ry. Co. v. Watson (Fla.), (decided November 12, 1931), 137 So. 719, 723; appeal dismissed November 7, 1932, — U. S. —, 77 Law Ed. 68 12
Stevens v. Tampa El. Co., 81 Fla. 512, 88 So. 303 15
Tampa Electric Co. v. Bazemore, 85 Fla. 164, 96 So. 297 14
Tampa Electric Co. v. Bourquardez, 72 Fla. 161, 72 So. 668 15
Tampa Electric Co. v. Bryant (decided April 15, 1931) (Fla.), 133 So. 887 13

STATUTES CITED.

Compiled General Laws of Florida, 1927, Sections 7051 and 7052 ..... 1, 2, 13

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 71

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SARAH ELIZABETH STRINGFELLOW, a widow, prays that a writ of certiorari issue to review the judgment entered March 31, 1933, in the United States Court of Appeals for the Fifth Circuit (R. 104) in the above entitled cause.

Questions Presented.

The sole question presented in this case is whether damages can be recovered against a railroad company under Sections 7051 and 7052, Compiled General Laws

of Florida, 1927, for the death of a driver of an automobile at a railroad and street intersection where the view at the crossing is obstructed and when it appears that both the driver of the automobile and the railroad company were negligent.

Statutes Involved.

Compiled General Laws of Florida, 1927, provide:

> "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." Section 7051.

> "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." Section 7052.

Statement.

Petitioner, in her own right as widow and as administratrix, on May 25, 1931, brought five separate actions in the District Court of the United States for the Southern District of Florida, Tampa Division (R.

28, 11, 19, 2, 36), against the railroad company for negligently running its train upon and fatally injuring her husband and two minor children at a street crossing in the city of Dunedin, Florida. A satisfactory statement of facts is found in the opinion of the Circuit Court of Appeals (R. 93-95), which we quote, but to which we have added in brackets the record page references of the facts thus recited:

> "The accident, which resulted in the injuries alleged, occurred in the daytime at a grade crossing where Scotland Street intersects the railroad right-of-way at right angles, the street extending east and west and the right-of-way north and south (R. 56). On the right-of-way the main line was flanked on either side by a side track (R. 64). To the south of the crossing the main line was straight for a mile or more, but the view in that direction of one going east on the street was cut off by trees until the west side track, within 20 feet of the main line, was reached, at which point the view to the south was open and unobstructed (R. 61, 86 and photographs). At the time of the accident appellant's husband was driving his automobile, in which his children, one seven, and the other nine, years of age, were riding with him, toward the east across the intersection; and the train was coming from the south. The train was a few minutes late (R. 60, 67) and was not due to stop at Dunedin (R. 85). A strong wind from the northwest interfered with the hearing of anyone at the crossing who might be listening for the rumble of the train, or for any warning that might have been given by whistle or bell (R. 60, 74). The evidence was in hopeless

conflict as to whether the whistle was sounded or the bell was rung, and also as to the speed of the train. Several witnesses for appellant who were near the place of the accident and in position to hear testified that they heard no whistle or bell; and they gave various estimates of the rate of speed, ranging from 30 to 50 miles per hour (R. 56, 57, 58, 60, 62, 63, 88). Two of these witnesses cited as evidence of their ability to estimate speed speedometer tests which they had made, while traveling by automobile on highways parallel with railroad tracks, of the speed of trains going in the same direction as they were (R. 56, 59). On the other hand, witnesses for appellee, particularly the engineer (R. 64), fireman (R. 67) and members of the train crew (R. 81, 84), testified that as the train approached Scotland Street the last of four blasts of the whistle was sounded, and that the bell was being rung by an automatic bell ringer from the time the train reached the fourth street south of Scotland Street until after the accident. Members of the train crew also testified that the train had slackened speed as it passed through Dunedin, and that it was running at a rate not exceeding 10 or 12 miles per hour as it approached Scotland Street. The fireman (R. 67) testified that he saw appellant's husband drive upon the crossing about 60 feet in front of the engine, and that he called to the engineer, who immediately put on the emergency brakes as soon as the fireman called out to him and stopped the train as quickly as possible. The engine proceeded about 100 yards north of Scotland Street before it was brought to a standstill (R. 62). Several witnesses for appellee testified that appellant's husband drove

> across the intersection at a speed of 10 or 15 miles per hour (R. 68, 80); but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actualy saw the train."

By direction of the district judge the cases were consolidated for trial (R. 54).

Negligence of the railroad company was alleged in failing to give warning of the approach of the train by sounding the whistle or ringing the bell of the engine and in running the train upon the street crossing at a dangerous rate of speed (R. 28). The railroad company pleaded not guilty (R. 35).

Rulings of the Court Below.

At the close of all the evidence the district court directed a verdict for the railroad company upon the ground that the injuries complained of were caused solely by the negligence of the petitioner's husband, driver of the automobile, and said in part (R. 88-89):

> "Gentlemen, between the Supreme Court of the United States and the Circuit Court of Appeals and the Supreme Court of Florida, they have got the Judge between the devil and the deep blue sea. The Supreme Court of the United States says that failure to stop, look, and listen is negligence. In a case that went up from Ohio they said that would defeat any recovery. Now the Circuit Court of Appeals, after that decision was rendered, have held that in Florida, under this apportionment statute that it would not necessarily defeat a recovery, and I think that is the better rule where the evi-

> dence shows that the proximate cause of the injury was the negligence of the railroad company and that failure to stop, look and listen was only contributory; but if the failure to stop, look and listen is the ultimate cause, then I am satisfied that there can be no recovery * * *."

In each case separate verdicts (R. 45-46) and judgments were entered (R. 46-49) and on the 20th day of April, 1932, separate appeals were taken to the Circuit Court of Appeals for the Fifth Circuit (R. 50-51), but on a single transcript and were docketed in the Circuit Court of Appeals as one case, argued as one case, and were disposed of by a single written opinion. The judgments appealed from were reversed on March 31, 1933, as to all actions *except* the one brought by petitioner in her own right as widow for the death of her husband (R. 104). A petition for rehearing was denied on April 21, 1933 (R. 116), and on April 21, 1933, the Circuit Court of Appeals entered an order granting petitioner's motion for a severance from all of her co-appellants for the purpose of filing a petition in this Court for a writ of certiorari (R. 115-116). Order staying the mandate was filed April 27, 1933 (R. 118-119).

The Circuit Court of Appeals, in its opinion, — Fed. (2d) — (R. 93), said in part (R. 95-96, 97):

> "In so far as the case depends upon appellant's right to recover for the death of her husband, we are of opinion that it was not error to direct a verdict for appellee. Her husband, as driver of the automobile, was under the duty to exercise the care and caution which a reasonably prudent man would have displayed under

same or similar circumstances. It therefore was his duty to use his senses of sight and hearing before undertaking to cross the railroad tracks. If when he had passed the trees and had an open view down the track he had looked he would have seen the train and could have avoided the collision. A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching train. Notwithstanding Paragraph 7052 he could not have recovered for an injury, and so recovery cannot be had on account of his death. * * * In our opinion the right of recovery for the deaths of the children should have been submitted to the jury. The children were guilty of no negligence; and their father's negligence could not be imputed to them. The judgment is defended as to them only on the theory that the father's negligence was the sole proximate cause of their deaths. But the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company. There was substantial evidence, tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run the train through a populous community without warning, or at a speed so great that it could not be stopped within less than 100 yards; especially if because of a strong headwind it

> was made difficult for those using the street intersection to hear a train approaching from the south * * * here it was opened for the jury to find that appellant's husband did not know or realize that a train was approaching. It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing."

Reasons for Granting the Petition.

The decision in this case holds that by reason of the failure of the driver to see the train "When he passed the trees and had an open view down the track" (R. 96) petitioner, "notwithstanding paragraph 7052" (R. 96), could not recover for his death, yet the court also holds with reference to petitioner's right to recover for the death of the children that "the jury might have reasonably concluded that their deaths were caused by the combined or concurring negligence of their father and the railroad company" (R. 96) and held that it appeared by the record that there was substantial evidence of the railroad company's negligence and it was a question for the jury to determine. On the other hand, the Supreme Court of the State of Florida has uniformly held that damages could be recovered for injury to the driver of an automobile where the injury was caused by the "combined or concurrent negligence" of the driver and the railroad company:

> "Under the laws of Florida, where a person attempts to drive an automobile over a railroad crossing with which he is familiar, when his view of the railroad track is so obstructed that an

approaching train cannot be seen, and he does not stop and look and listen or take such precautions for his sake as are reasonably required by the existing circumstances, he is negligent so as to prevent recovery of damages from a railroad company for his injury or death by being struck by the train, unless some appreciable negligence of the railroad company's agent proximately contributed to such injury or death in which case the damages awarded should be such a proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of both parties."

Florida East Coast Railroad Company v. *Townsend,* 140 So. 196, 198, and cases cited therein.

The result is, if the decision of the Circuit Court of Appeals is to stand, one rule will prevail in the Federal courts in Florida on the question while a different rule will prevail in the State courts, which, we submit, in the interests of uniformity, should be decided by this Court, and we contend further it should be decided in accordance with the construction the State courts place upon its statutes.

The importance of the question presented is due to the large number of street and highway intersections with railroad grade crossings in the State of Florida and the large number of automobiles driving over these crossings, the litigation that is sure to result and the conflicting determination of the question presented in the State and Federal courts.

Your petitioner presents herewith, as a part of this petition, a certified copy of the transcript of the rec-

ord in the courts below, and will present her brief for consideration with this petition, discussing at greater length the question involved.

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings in said cause, entitled: Sarah Elizabeth Stringfellow, a widow and as administratrix, etc., *vs.* Atlantic Coast Line Railroad Company, a corporation, and numbered 6617 in said court, to the end that said case may be reviewed and determined by this Court, and that the petitioner may have such relief as this Court may deem proper, and that the opinion and judgment of said Circuit Court of Appeals and of said District Court may be reversed by this Honorable Court.

SARAH ELIZABETH STRINGFELLOW,
By WM. C. MCLEAN,
Her Attorney.

BRIEF.

Opinions Below.

The opinion of the Circuit Court of Appeals (Circuit Judges Bryan, Sibley and Hutcheson, Judge Bryan writing, Judge Hutcheson dissenting and writing a separate opinion) was filed March 31, 1933, and appears at page 93 of the record. It is reported in — Fed. (2d) —.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (*a*) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U. S. C. A. 347. The judgment of the Circuit Court of Appeals was entered March 31, 1933 (R. 104). Petition for rehearing was denied April 21, 1933 (R. 116).

The Facts.

The facts are stated in the petition. We emphasize that the proof showed that both the petitioner's husband and the railroad company were legally negligent, that is, the negligence of each proximately contributed or concurred to produce the injury and death of petitioner's husband.

ARGUMENT.

Can damages be recovered against a railroad company under Sections 7051 and 7052, Compiled General Laws of Florida, 1927, for the death of the driver of an automobile at a railroad crossing, in a case where it

appears that the driver does not take such precautions for his safety as are reasonably required by the existing circumstances, yet some appreciable negligence of the railroad company proximately contributed to his death?

Conflict of Decisions.

The Supreme Court of the State of Florida has answered this question in the affirmative: "In which case the damages awarded should be such a proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of both parties."

Florida East Coast R. R. Co. v. *Townsend,* 140 So. 196, 198, 142 So. 909, 143 So. 445.

The Circuit Court of Appeals has answered this question in the negative.

In the separate dissenting opinion of Mr. Justice Hutcheson (R. 98) the conflict of the majority opinion with the above quoted statute and to the meaning and effect given to the words of the statute by the Florida decisions is very clearly set forth. Two additional citations will serve to show the conflict more strongly. In *Seaboard Air Line Ry. Co.* v. *Watson,* 137 So. 719 (decided November 12, 1931), appeal dismissed November 7, 1932, — U. S. —, 77 Law Edition 68, the Florida Supreme Court said, 137 So., at top of page 723:

> "Where injury at a railroad crossing is caused solely by the negligence of a party injured, there can be no recovery; but if the injury was caused

by running of the train, and both the injured party and the employees of the company were at fault, there may be recovery, but damages will be reduced in proportion to contributory negligence. Section 7051 (4964) and Section 7052 (4965) *Compiled General Laws of Florida* of 1927; *Atlantic Coast Line R. Co.* v. *Watkins*, *supra* (97 Fla. 350, 121 So. 195); *Germak* v. *Florida East Coast Ry. Co.*, 95 Fla. 991, 117 So. 391; *Louisville & Nashville Ry. Co.* v. *Harrison*, 84 Fla. 479, 94 So. 382; *Tampa Electric Co.* v. *Bryant* (Fla.), 133 So. 887."

The Florida Supreme Court has recognized the standard of care required of a person in crossing a railroad track as announced by this Court in *B. & O. R. R. Co.* v. *Goodman*, 275 U. S. 66, 48 S. Ct. 24, 72 Law Ed. 167, but has applied it to the Florida Statute in a manner different from the majority opinion of the Circuit Court of Appeals in this case. In *Germak* v. *Florida East Coast Ry. Co.* decided May 30, 1928, 95 Fla. 991, 117 So. 391, at page 392, after quoting the language of Mr. Justice Holmes in the Goodman case, the Florida Supreme Court said:

"(3) This rule has reference to the standard of conduct required by the law of persons in crossing railroad tracks. It does not relate to the standard of duty imposed upon railroad companies or define the liability of such companies under a statute like the one in Florida which provides that:

"'A railroad company shall be liable for any damage done to persons * * * by the running of the locomotives, or cars * * * unless the

company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.' 'No person shall recover damages from a railroad company for injury to himself or his property * * * caused by his own negligence. If the complainant and the agents are both at fault, the former may recover, but the damages shall be diminished or increased * * * in proportion to the amount of default attributable to him.' Sections 4964, 4965, Rev. Gen. Stats. 1920."

"(4, 5) Under the above statutory provisions, the rule announced by the Supreme Court of the United States in the Goodman case, *supra,* may be an appropriate standard of care required of a person in crossing a railroad track, to be applied in actions to recover damages for personal injuries received by collision with a train at a railroad crossing, and negligence of the injured person may appear from his failure to observe the required standard, which would bar recovery under the law in some states, see *Penn. R. Co.* v. *Rusynik* (Ohio), 159 N. E. 826; yet, under the Florida Statute, if an injury is duly alleged and shown to have been caused by the running of a railroad company's train, there may be a recovery for damage done, unless the company shall make it appear that its employees exercised all ordinary and reasonable care and diligence in the premises, *Tampa El. Co.* v. *Bazemore,* 85 Fla. 164, 96 So. 297; but if it appears that the injury was caused solely by the negligence of the party injured, there can be no recovery, *S. A. L. Ry. Co.* v. *Myrick,* 91 Fla., 918, 109 So. 193; *S. A. L. Ry. Co.* v. *Toberlin,* 70 Fla.

435, 70 So. 437; *Tampa El. Co.* v. *Bourquardez*, 72 Fla. 161, 72 So. 668; and, if both the injured and the employees of the railroad company were at fault in causing the injury, there may be a recovery, but the damages will be reduced in proportion to the contributory negligence of the injured party. *L. & N. Ry. Co.* v. *Norton*, 75 Fla. 597, 78 So. 982; *A. C. L. Ry. Co.* v. *Weir*, 63 Fla. 69, 58 So. 641, 41 L. R. A. (N. S.) 307, *Ann. Cas.* 1914A, 126; *Davis* v. *Cain*, 86 Fla. 18, 97 So. 305; *Stevens* v. *Tampa El. Co.* 81 Fla. 512, 88 So. 303; *S. A. L. Ry.* v. *Callan*, 73 Fla. 688, 74 So. 799, 35 S. Ct. 654, 59 L. Ed. 1069; *Ann. Cas.* 1914C, 172, 109 So. 432."

We emphasize the language of Mr. Justice Hutcheson's separate dissenting opinion at Record page 103.

"In *Claughton* vs. *Atlantic Coast Ry.*, 47 Fed. (2) 679, this court correctly announced and applied the Florida rule that while the sole negligence of a father is a bar to recovery for a crossing injury, contributory negligence is not. Such negligence bars neither the driver nor those in the vehicle with him. It merely diminishes the amount of the recovery of those negligent or responsible for the negligence. *Bradley* vs. *Mo. Pac. Ry.*, 288 Fed. 484. The opinion of the majority advances a third view as maintainable in Florida, that there are degrees of contributory negligence, and that a driver may be so contributory negligent as that though the recovery of those in the car with him will not be barred because his negligence is not the sole but a concurring proximate cause of the injury, his own recovery will be. I find no warrant in the

Florida statute nor in any of its decisions, for this view. I think it overrules the Claughton case. I respectfully dissent from it."

After the decision of this Court in *B. & O. R. R. Co.* v. *Goodman, supra,* there arose a conflict in the Federal and State courts in Florida upon the question involved in this case. The law became well settled in the State courts after the decision of the Florida Supreme Court in *Germak* v. *F. E. C. R. R. Co., supra;* and the law also appeared to be well settled in the Federal courts after the decision of the Circuit Court of Appeals in *Claughton* v. *A. C. L. R. R. Co.,* 47 Fed. (2) 679, wherein the Germak case was cited with approval, but confusion is now sure to result unless this Court will once and for all definitely settle the rule to be followed by the Federal courts in Florida.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that petitioner could not recover damages for the death of her husband under Section 7052, Compiled General Laws of Florida, 1927, notwithstanding the fact that the evidence did not establish as a matter of law that the husband's negligence was the sole proximate cause of the injury, but no more than a concurring proximate cause.

2. In holding that petitioner was not entitled to have the question of her right of recovery for the death of her husband submitted to the jury.

Statement of Law Advanced.

Under Section 7052, Compiled General Laws of Florida, 1927, contributory negligence does not bar a recovery, but merely diminishes the amount of recovery in proportion to the contributory negligence of the injured party.

Conclusion.

Your petitioner respectfully submits that the final determination by this Court of the question involved in this case is of the utmost importance to the rights of travelers on the streets and highways of Florida intersecting with railroad grade crossings, as well as uniformity of law in the State and Federal courts of Florida in the large number of cases that will arise from the continued passage of automobiles over railroad grade crossings.

Respectfully submitted,

WM. C. MCLEAN,
Attorney for Petitioner.

INDEX.

Subject Index.

	Page
Opinion and judgment below	1
Jurisdiction	2
Statement of the case	2
Specification of errors	6
Statutes involved	6
Argument	7
1. Was the evidence sufficient for the jury to reasonably have concluded that some appreciable negligence of the railroad company approximately contributed to the death of petitioner's husband	9
2. What is the effect of the Florida statute where the injury and death was caused by the combined or concurrent negligence of the driver of the car and the railorad company	18
Conclusion	26

Authorities Cited.

A. Mortellaro & Co. v. A. C. L. R. R. Co. (Fla.), 107 So. 528	17
Atlantic Coast Line Railroad Co. v. Jones (Fla.), 123 So. 920	22
Benedict v. Ratner (1925), 268 U. S. 353; 45 S. Ct. 566, 69 L. Ed. 991	8
B. & O. R. R. Co. v. Goodman, 275 U. S. 66, 48 S. Ct. 24, 72 L. Ed. 167	18, 20
Dina v. S. A. L. R. R. Co. (Fla.), 106 So. 418	17
Director General of Railorads v. Into (Fla.), 91 So. 269, 271	17
Florida East Coast Railroad Company v. Townsend (Fla.), 140 So. 196, 198	8, 18, 19, 24
Germak v. Florida East Coast Ry. Co., 95 Fla. 911, 117 So. 391	18, 19, 20
Jarrett v. Wabash Ry. Co., 57 Fed. (2) 669, 671	13
Northern Pacific Railroad v. Freeman, 174 U. S. 379, 381, 19 S. Ct. 763, 764	13
Richmond & Danville Ry. Co. v. Powers, 149 U. S. 43, 45	12
Rocco v. Lehigh Valley R. Co. (decided February 6, 1933), 77 Law Ed. 438, 440	26
Seaboard Air Line Ry. Co. v. Myrick, 91 Fla. 918, 109 So. 193	23, 25
Seaboard Air Line Ry. Co. v. Watson (Fla.), 137 So. 719 (appeal dismissed November 7, 1932, 77 Law Ed. 68)	14, 17, 19, 25
Southern Pacific Co. v. Kauffman, 50 Fed. (2) 150 (C. C. A. 9)	14

Statutes.

U. S. Rev. Stat., Sec. 721, U. S. C. A. Title 28, Sec. 725	8
Compiled General Laws of Florida, 1927, Secs. 7051, 7052	6, 7, 18, 26

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 71

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER.

I.

Opinion and Judgment Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (Circuit Judges Bryan, Sibley and Hutcheson, Judge Bryan writing, Judge Hutcheson dissenting and writing a separate opinion) is reported in 64 Fed. (2) 173, and appears at pages 93 and 98 of the record.

II.

Jurisdiction.

Writ of certiorari was granted October 9, 1933.

III.

Statement of the Case.

Petitioner, in her own right as widow and as administratrix, on May 25, 1931, brought five separate actions in the District Court of the United States for the Southern District of Florida, Tampa Division (R. 28, 11, 19, 2, 35), against the railroad company for negligently running its train upon and fatally injuring her husband and two minor children at a street crossing in the city of Dunedin, Florida. A satisfactory statement of facts is found in the opinion of the circuit court of appeals (R. 93-95), which we quote, but to which we have added in brackets the record page references of the facts thus recited:

> "The accident, which resulted in the injuries alleged, occurred in the daytime at a grade crossing where Scotland Street intersects the railroad right-of-way at right angles; the street extending east and west and the right-of-way north and south (R. 56). On the right-of-way the main line was flanked on either side by a side track (R. 64). To the south of the crossing the main line was straight for a mile or more, but the view in that direction of one going east on the street was cut off by trees until the west side track, within 20 feet of the main line, was reached, at which point the view to the south was open and unobstructed (R. 61, 86 and photographs). At the time of the accident appellant's husband was driving his automobile, in which his children, one seven, and the other nine, years of age, were riding with him, toward the east across the intersection; and the train was coming from the

south. The train was a few minutes late (R. 60, 67) and was not due to stop at Dunedin (R. 85). A strong wind from the northwest interfered with the hearing of anyone at the crossing who might be listening for the rumble of the train, or for any warning that might have been given by whistle or bell (R. 60, 74). The evidence was in hopeless conflict as to whether the whistle was sounded or the bell was rung, and also as to the the speed of the train. Several witnesses for appeliant who were near the place of the accident and in position to hear testified that they heard no whistle or bell; and they gave various estimates of the rate of speed, ranging from 30 to 50 miles per hour (R. 56, 57, 58, 60, 62, 63, 88). Two of these witnesses cited as evidence of their ability to estimate speed speedometer tests which they had made, while traveling by automobile on highways parallel with railroad tracks, of the speed of trains going in the same direction as they were (R. 56, 59). On the other hand witnesses for appellee, particularly the engineer (R. 64), fireman (R. 67) and members of the train crew (R. 81, 84), testified that as the train approached Scotland Street the last four blasts of the whistle was sounded, and that the bell was being rung by an automatic bell ringer from the time the train reached the fourth street south of Scotland Street until after the accident. Members of the train crew also testified that the train had slackened speed as it passed through Dunedin, and that it was running at a rate not exceeding 10 or 12 miles per hour as it approached Scotland Street. The fireman (R. 67) testified that he saw appellant's husband drive upon the crossing about 60 feet in front of the engine, and that he called to the engineer, who immediately put on the emergency brakes as soon as the fireman called out to him and stopped the train as quickly as possible. The engine proceeded about 100 yards north of Scotland Street before it was brought to a standstill (R. 62). Several witnesses for appellee testified that appellant's husband drove across the intersection at a speed of 10 or 15 miles per hour (R.

68, 80); but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train."

By direction of the district judge the cases were consolidated for trial (R. 54).

Negligence of the railroad company was alleged in failing to give warning of the approach of the train by sounding the whistle or ringing the bell of the engine and in running the train upon the street crossing at a dangerous rate of speed (R. 28). The railroad company pleaded not guilty (R. 35).

At the close of all the evidence the district court directed a verdict for the railroad company upon the ground that the injuries complained of were caused solely by the negligence of the petitioner's husband, driver of the automobile (R. 88–89).

In each case separate verdicts (R. 45–46) and judgments were entered (R. 46–49) and on the 20th day of April, 1932, separate appeals were taken to the Circuit Court of Appeals for the Fifth Circuit (R. 50–51), but on a single transcript and were docketed in the circuit court of appeals as one case, argued as one case, and were disposed of by a single written opinion. The judgments appealed from were reversed on March 31, 1933, as to all actions *except* the one brought by petitioner in her own right as widow for the death of her husband (R. 104). On April 21, 1933, the circuit court of appeals entered an order granting petitioner's motion for a severance from all of her co-appellants for the purpose of filing a petition in this Court for a writ of certiorari (R. 115–116).

The circuit court of appeals, in its opinion, 64 Fed. (2d) 173 (R. 93), said in part (R. 95–96, 97):

"In so far as the case depends upon appellant's right to recover for the death of her husband, we are of

opinion that it was not error to direct a verdict for appellee. Her husband, as driver of the automobile was under the duty to exercise the care and caution which a reasonably prudent man would have displayed under same or similar circumstances. It therefore was his duty to use his senses of sight and hearing before undertaking to cross the railroad tracks. If when he had passed the trees and had an open view down the track he had looked he would have seen the train and could have avoided the collision. A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching train. Notwithstanding Paragraph 7052 he could not have recovered for an injury, and so recovery cannot be had on account of his death. * * *. In our opinion the right of recovery for the deaths of the children should have been submitted to the jury. The children were guilty of no negligence; and their father's negligence could not be imputed to them. The judgment is defended as to them only on the theory that the father's negligence was the sole proximate cause of their deaths. But the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company. There was substantial evidence, tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run the train through a populous community without warning, or at a speed so great that it could not be stopped within less than 100 yards; especially if because of a strong head-wind it was made difficult for those using the street intersection to hear a train approaching from the south. * * * here it was opened for the jury to find that appellant's husband did not know or realize that a

train was approaching. It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing."

IV

Specification of Errors.

The circuit court of appeals erred:

1. In holding that petitioner could not recover damages for the death of her husband under Section 7052, Compiled General Laws of Florida, 1927, notwithstanding the fact that the evidence did not establish as a matter of law that the husband's negligence was the sole proximate cause of the injury, but no more than a concurring proximate cause.

2. In holding that petitioner was not entitled to have the question of her right of recovery for the death of her husband submitted to the jury.

V.

Statutes Involved.

Compiled General Laws of Florida, 1927, provide:

> "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." Section 7051.
>
> "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." Section 7052.

VI.

ARGUMENT.

Can damages be recovered against a railroad company under Sections 7051 and 7052, Compiled General Laws of Florida, 1927 for the death of a driver of an automobile at a railroad and street intersection where the view at the crossing is obstructed and where it appears that both the driver of the automobile and the railroad company were negligent?

The circuit court of appeals has answered the question in the negative. The decision in this case holds that by reason of the failure of Stringfellow to see the train, "when he had passed the trees and had an open view down the track" (R. 96) petitioner, "notwithstanding paragraph 7052" (R. 96) could not recover for his death, yet the court also holds with reference to petitioner's right to recover for the death of the children that "the jury might have reasonably concluded that their deaths were caused by the combined or concurring negligence of their father and the railroad company" (R. 96) and held that it appeared by the record that there was substantial evidence of the railroad company's negligence and it was a question for the jury to determine. On the other hand, the Supreme Court of the State of Florida has uniformly held that damages could be recovered for injury to the driver of an automobile where the injury was caused by the "combined or concurrent negligence" of the driver and the railroad company:

> "Under the laws of Florida, where a person attempts to drive an automobile over a railroad crossing with which he is familiar, when his view of the railroad track is so obstructed that an approaching train cannot be seen, and he does not stop and look and listen or take such precautions for his sake as are reasonably required by the existing circumstances, he is negligent

so as to prevent recovery of damages from a railroad company for his injury or death by being struck by the train, unless some appreciable negligence of the railroad company's agent proximately contributed to such injury or death *in which case the damages awarded should be such a proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of both parties.*

Florida East Coast Railroad Company v. *Townsend,* 140 So. 196, 198, *and cases cited therein.*

If the decision of the circuit court of appeals is to stand, one rule will prevail in the Federal Courts in Florida on the question, while a different rule will prevail in the State courts. This question, we contend, should be decided in accordance with the meaning and effect given to the words of the Statute by the Florida Supreme Court.

"The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." *Revised Statutes Sec.* 721, 28 U. S. C. A. Sec. 725. This Court said in *Benedict* v. *Ratner,* (1925), 268 U. S. 353, 45 Sct. 566, 69 L. Ed. 991:

> "No case yet has gone to the length of undertaking to correct the construction of state laws by state courts. The exclusive authority to enact those laws carries with it the final authority to say what they mean."

It must therefore be determined first, whether the evidence was sufficient for the jury to reasonably have concluded that "some appreciable negligence of the railroad company's agent proximately contributed to such injury or death" (*Florida East Coast Railroad Company* v. *Townsend, supra*); and second, what is the effect of the Florida statute when the injury or death was caused by the

combined or concurrent negligence of driver of the car and the railroad company.

1. Was the evidence sufficient for the jury to reasonably have concluded that some appreciable negligence of the railroad company proximately contributed to the death of petitioner's husband?

The plaintiff introduced evidence, which if believed by the jury, was sufficient to establish negligence upon the part of the railroad company. The train was running late (R. 60). One block from where the accident occurred it was traveling between 40 and 50 miles an hour (R. 57). The bell was not ringing and the whistle was not blowing (R. 57, 59). The speed of the engine when it reached Scotland Street, according to one witness, was 35 to 40 miles an hour (R. 57), another placed the speed between 40 and 50 miles an hour (R. 59) and another placed the speed between 40 and 50 miles an hour (R. 87, 88). In addition to this it was established by uncontroverted testimony that the accident happened on one of the main thoroughfares of the city of Dunedin, at a populous section of the city, and that Scotland Street crossing was one that is constantly and habitually used by the people in crossing and recrossing the railroad tracks; and that in approaching the railroad tracks in an easterly direction along Scotland Street intervening objects prevent the view of an approaching train from the south until a person is "on the side-track" (R. 61, 86).

This testimony, if true, was clearly sufficient to establish negligence upon the part of the railroad company and the case should have been submitted to the jury. In addition to the testimony of the plaintiff, the testimony of the defendant's chief witness, Mabel L. Seeley (R. 69) was contradicted by the plaintiff's witnesses, Mrs. George Smart (R. 86) and W. H. James (R. 87). This contradiction was

clearly a question of credibility to be determined by the jury and not by the trial court. Aside from this the defendant's witness, O. C. Howell (R. 74) admitted that he had previously testified at a coroner's inquest contrary to the facts he testified about at the trial of the case, and the same is true of the defendant's witness, J. C. Hill (R. 80); and the defendant's witness, Roy Outing (R. 79), testified that the whistle did not blow within two blocks south of Scotland Street and "all I heard that the train was doing was the bell ringing." It, therefore, appears that there was a conflict in the testimony, not only between the witnesses for the plaintiff and the defendant, but also there was a conflict in the testimony of the defendant's witnesses.

The fourth count in each of the declarations alleged that at the time there was a strong wind blowing from the northwest and that the defendant failed to give suitable and proper warnings of the approach of the train and failed to use such ordinary precaution as the exigencies of the circumstances required. The failure of the defendant to give suitable and proper warning of its approach was developed from the testimony of the defendant's witness, O. C. Howell (R. 74), who testified that: "The wind was blowing and if you were not paying close attention you might not hear the whistle blow. If you were standing out in the open you could hear it" (R. 77). The whistle referred to by this witness was an air whistle. This witness admitted that the steam whistle did not blow after it passed the water tank a mile or so south of where the accident occurred. It is the contention of the petitioner that it was negligence on the part of the defendant under the circumstances, to blow an air whistle, the sound of which was obstructed by the wind and that this was not a suitable and proper warning of the approach of the train. Most all of the witnesses testified to hearing a steam whistle on the

train when it was some distance from where the accident occurred, while the train crew testified that the steam whistle was blowing. Yet two of the defendant's witnesses, O. C. Howell (R. 74) and J. O. Hill (R. 80) testified or admitted that they had previously testified that the whistle referred to by the defendant's other witnesses was an air whistle. If it be true that only an air whistle was blown as this train approached Scotland Street, and traveling at the rate of speed fixed by the plaintiff's witnesses and the sound of the air whistle was obstructed by the wind, we submit that this establishes negligence on the part of the railroad company in failing to give suitable and proper warning of the approach of the train. Conflict in the testimony as to the speed of the train and the failure to give warning of its approach should have been submitted to the jury. It is purely a question of fact to be determined by a jury and not by the court in peremptorily directing a verdict to be returned for the defendant.

The trial court, therefore, infringed upon the plaintiff's right to have this case submitted to a jury by directing a verdict for the defendant. The trial judge in granting the motion for a directed verdict admitted that there was a conflict as to the negligence alleged in the declaration and refused to allow the case to go to a jury because: "I am under my oath as judge to decide one way or another as it appears to me. I cannot see that there is any negligence here upon the part of the railroad and that it in any way contributed to this unfortunate accident; therefore you may prepare a verdict in each one of the cases" (R. 90). And in directing the jury to return a verdict, the trial court further stated: "In this court the judge is required to assume some responsibility. He is not the mere referee of a fair fight to sit up here and let the jury pass upon the questions, and the court has decided that under all of the

evidence here as a matter of law that neither of these plaintiffs could recover against the railroad company" (R. 90). It appears further from the trial court's statements in granting the defendant's motion for a directed verdict that the trial court even went so far to pass upon the credibility of the plaintiff's witnesses, as is disclosed by the following statement: "Now the testimony that put it up around 50 or 60 miles an hour just shows that they did not know what they were talking about. If they had put it above 30 they would not know what they were taking about. They stretched it too much. They overreached themselves" (R. 90). It therefore appears from the foregoing that the trial court assumed the province of the jury to pass upon conflicting testimony and the credibility of the witnesses. This is clearly contrary to well established doctrine. "Issues that depend on the credibility of witnesses and the effect and weight of evidence are to be decided by the jury * * * Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair minded men may honestly draw different conclusions from them, the question is not one of law but of fact, to be settled by the jury." *Richmond & Danville Ry. Co.* v. *Powers,* 149 U. S. 43, 45.

It will be observed, upon the reading of the record in this case, that all of the defendant's witnesses who testified as to the speed of the train and the blowing of the whistle, were in the employ of the defendant, except the witness Baldwin (R. 78), Howell (R. 74), and Roy Outing (R. 79). The witness Baldwin was not in a position to testify with any degree of certainty as to the position of the train at the time the alleged signals were given, nor concerning the speed of the train. Howell's testimony was admitted by him to be untrue. On the other hand, the defendant's witness, Roy Outing, testified positively that the whistle did

not blow within two blocks from the point where the collision occurred. Conflict in the testimony of the defendant's witnesses as to whether warning signals were given was sufficient to submit that issue to the jury in view of the fact that several of the defendant's witnesses were in the coaches of the train and manifestly were not in a position to testify with any reasonable degree of certainty as to the position of the train at the time the alleged signals were given. The fact that these witnesses were in the employ of the defendant and were to some degree at least interested in the outcome of the case, was sufficient to present the question of their credibility to the determination of the jury:

> "The testimony to the effect that the engine whistle was blown and the bell rung was given by *employees* of appellant, and of course, their interest as such, made their credibility a question of fact for the jury." *Jarrett* v. *Wabash Ry. Co.*, 57 Fed. (2) 669, 671.

It cannot, therefore, be said that there was no evidence to support the contention of respondent's negligence; and this being so the question could not be decided as a matter of law, but one to be submitted to a jury. In view of all the conditions of the entire situation at the time and place of the accident, with a conflict in the evidence over the material facts, the question of respondent's negligence was obviously one for the jury. And since a verdict was directed in favor of respondent (R. 90) this Court must consider the evidence and all reasonable references to be deducted therefrom in the light most favorable to petitioner.

This Court said in *Northern Pacific Railroad* v. *Freeman*, 174 U. S. 379, 381, 19 S. Ct. 763, 764:

> "There was testimony from several witnesses in the neighborhood tending to show that no whistle was

blown by the engineer as the train approached the crossing. There was also the testimony of the conductor, engineer, and firemen that the whistle was blown. As the majority of plaintiff's witnesses were so located that they would probably have heard the whistle if it had blown, there was a conflict of testimony with respect to defendant's negligence, which was properly left to the jury."

In the majority opinion in the court below, the court said (R. 96):

"There was substantial evidence tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run the train through a populous community without warning or at a speed so great that it could not be stopped within less than 100 yards; especially if because of a strong head wind it was made difficult for those using the street intersection to hear a train approaching from the south. * * * here it was open for the jury to find that appellant's husband did not know or realize that a train was approaching. It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing. The Covington case does not purport in any wise to limit or overrule the earlier case of *S. A. L. Ry.* v. *Watson,* 94 Fla. 571, where it was said 'There may be concurrent causes of a single injury—concurrent negligence of two separate and distinct agencies, which, operating contemporaneously, together constitute the efficient proximate cause of the injury inflicted, and without either one of which the harm would not have been done.'"

If Stringfellow did not see the approaching train, although he might have done so by looking, and, in ignorance of the fact that it was approaching, moved forward ("I thought Mr. Stringfellow saw the train; he drove up pretty close to the tracks and almost stopped, looked south and then north and then speeded ahead to cross. I thought he saw the train, but undoubtedly he did not," R. 73), to the point of collision, the failure of the railroad company to give warning of the approach of the train and its speed under the circumstances, tending to contribute to his ignorance, and therefore to the disaster, would be a proximate cause of the injury. If the railroad company was negligent, the fact that Stringfellow was also negligent is not a determining factor. The negligence of both may have been *concurrent.*

This rule is very aptly stated by the court in the case of *Southern Pac. Co.* v. *Kauffman,* 50 Fed. (2d) 150 (C. C. A., 9), on page 165, where the following instruction was given:

> "If you believe from the evidence that the automobile approached to a point within fifteen feet of the track, slowing down as if to stop, and that from such point the driver of the automobile had a clear and unobstructed view in the direction of the approaching train and that she saw, or had she looked she would have seen, the train approaching when she left such point and proceeded over the railroad crossing in said automobile, then I instruct you that the proximate cause of said collision was the negligence of the driver of said automobile, and your verdicts must be for the defendant, Southern Pacific Company, in both cases.
>
> "(12-14) This instruction, in our view, was erroneous so far as the appellee is concerned, for the reason that in determining whether or not the negligence of the railroad company was the proximate cause of the injury the fact that the driver of the automobile was

also negligent is not a determining factor. The negligence of both may have been concurrent, co-operating to cause the injuries to the appellee. If the driver of the automobile saw the approaching train in time to stop, any negligence of the railroad company in failing to give notice of the approach of the train would no longer be an operating cause for the injury. If, however, she did not see the approaching train, although she might have done so by looking, and, in ignorance of the fact that it was approaching, moved forward to the point of collision, the failure of the railway company to give warning of the approach of the train tending to contribute to her ignorance, and therefore to the disaster, would be a proximate cause of the injury."

The same rule obtains in Florida, as appears from the following decisions of the Florida Supreme Court:

"If the decedent was merely negligent in being on the track at the particular instant, the negligent speed of the train reasonably might have contributed to the causes resulting in the injury, by rendering it impossible for the decedent to get off the track he was crossing in time to avoid injury, even if he knew of the approach of the engine; and under the statute regulating the liability of railroad companies, the plaintiff's negligence reduces, but does not prevent, recovery, when the defendant is also negligent. There was a legal basis in the pleadings and evidence for a finding by the jury that the unlawful and excessive, and consequently negligent, rate of speed of the train in the town, and failure to give warning at the street crossing were a participating proximate cause of the injury. The verdict indicates such a finding. The evidence does not affirmatively show that the decedent's death was 'caused by his own negligence' so as to preclude a recovery under the statute (Section 4965, Rev. Gen. Stats. 1920) and requested charges on the theory that the decedent's own negligence was the sole proximate cause of his death were not erroneously refused, in

view of the evidence as to the absence of signals and of the excessive speed of the train and of all the evidence and the language of the charges as requested. Contributory negligence reduces, but does not bar, a recovery of the damages for a negligent injury by a railroad train."

Director General of Railroads v. *Into*, 91 So. 269, 271.

To the same effect see:

A. Mortellaro & Co. v. *A. C. L. R. R. Co.*, 107 So. 528.
Dina v. *S. A. L. R. R. Co.*, 106 So. 418.
S. A. L. R. R. Co. v. *Watson*, 137 So. 719.

In view of the evidence adduced upon the trial and the findings of fact by the circuit court of appeals, it must follow that there was evidence sufficient for the jury to reasonably have concluded that some appreciable negligence of respondent contributed to the death of petitioner's husband. It must, therefore, be said that his injury and death was caused by the combined or concurrent negligence of himself and the railroad company. *In fact the circuit court of appeals said so!* If the evidence did not establish, as a matter of law, that Stringfellow's negligence was the sole proximate cause of the death of his children, but the jury from that evidence might reasonably have concluded that their deaths were caused by the combined negligence of their father and the railroad company, then it must follow, as night the day, that the jury might reasonably have concluded that Stringfellow's death was caused by the combined negligence of Stringfellow and the railroad company! This is the only conclusion that can be reached! The separate dissenting opinion of Mr. Justice Hutcheson (R. 98) clearly demonstrates this conclusion. If negligence of the railroad company contributed or concurred in the death of the children, it also contributed

or concurred in the death of Stringfellow! *That negligence cannot vanish by the same proof from which it appeared!* Yet in the face of this conclusion the majority opinion holds that petitioner could not recover for the death of her husband, notwithstanding Section 7052, *supra*. Manifestly the court necessarily founded its opinion upon its finding that within 20 feet from the main line the view to the south was open and unobstructed (R. 94). "If when he had passed the trees and had an open view down the track he had looked he would have seen the train and could have avoided the collision" (R. 96). It is further apparent that the majority opinion based its decision upon the ruling of this Court in *B. & O. R. R. Co.* v. *Goodman*, 275 U. S. 66, 48 S. Ct. 24, 72 Law Ed. 167, which the Florida court refused to follow (*Germak* v. *Florida East Coast Ry. Co.*, 95 Fla. 911, 117 So. 391), because of the Florida statute, Section 7052, *supra*. This leads us to the second question presented by the record in this case.

2. What is the effect of the Florida statute, where the injury and death was caused by the combined or concurrent negligence of the driver of the car and the railroad company?

The separate dissenting opinion in the court below (R. 98) very clearly states the conflict of the majority opinion with Section 7052, *supra*, and with the decisions of the Supreme Court of Florida. It must be borne in mind that under this statute and decisions, while *sole negligence* of the driver of an automobile will bar recovery for a crossing injury, *contributory negligence* will not. Under this statute contributory negligence merely diminishes the amount of recovery.

The length of this brief is materially reduced by the separate dissenting opinion of Mr. Justice Hutcheson (R.

98). In addition to the decisions cited by him, in *Seaboard Air Line Ry. Co.* v. *Watson,* 137 So. 719 (decided November 12, 1931), appeal dismissed November 7, 1932, 77 Law Ed. 68, the Florida Supreme Court said, 137 So., at top of page 723:

> "Where injury at a railroad crossing is caused solely by the negligence of a party injured, there can be no recovery; but if the injury was caused by running of the train, and both the injured party and the employees of the company were at fault, there may be a recovery, but damages will be reduced in proportion to contributory negligence. Section 7051 (4964) and Section 7052 (4965), Compiled General Laws of Florida of 1927; *Atlantic Coast Line R. Co.* v. *Watkins, supra* (97 Fla. 350, 121 So. 195); *Germak* v. *Florida East Coast Ry. Co.,* 95 Fla. 991, 117 So. 391; *Louisville & Nashville Ry. Co.* v. *Harrison,* 84 Fla. 479, 94 So. 382; *Tampa Electric Co.* v. *Bryant* (Fla.), 133 So. 887."

Subsequent to that decision the Florida Supreme Court in *Florida East Coast Railroad Company* v. *Townsend,* 140 So. 196, 198, *supra,* reaffirmed the position taken by petitioner in this case, that where a person attempts to drive an automobile over a railroad crossing with which he is familiar, when his view of the railroad track is so obstructed that an approaching train cannot be seen, and he does not stop and look and listen or take such precautions for his safety as are reasonably required by the existing circumstances, he is negligent so as to prevent recovery of damages from a railroad company for his injury or death by being struck by the train, unless some appreciable negligence of the railroad company's agent proximately contributed to such injury or death, in which case the damages awarded should be such a proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of both parties.

The Florida Supreme Court has recognized the standard of care required of a person in crossing a railroad track as announced by this Court in *B. & O. R. R. Co.* v. *Goodman*, 275 U. S. 66, 48 S. Ct. 24, 72 Law Ed. 167, but has applied it to the Florida statute in a manner different from the majority opinion of the Circuit Court of Appeals in this case. In *Germak* v. *Florida East Coast Ry. Co.*, decided May 30, 1928, 95 Fla. 991, 117 So. 391, at page 392, after quoting the language of Mr. Justice Holmes in the Goodman case, the Florida Supreme Court said:

> "(3) This rule has reference to the standard of conduct required by the law of persons in crossing railroad tracks. It does not relate to the standard of duty imposed upon railroad companies or define the liability of such companies under a statute like the one in Florida which provides that:
>
> "'A railroad company shall be liable for any damage done to persons * * * by the running of the locomotives, or cars * * * unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company. No person shall recover damages from a railroad company for injury to himself or his property * * * caused by his own negligence. If the complainant and the agents are both at a fault, the former may recover, but the damages shall be diminished or increased * * * in proportion to the amount of default attributable to him. Sections 4964, 4965, Rev. Gen. Stats. 1920.'"
>
> "(4, 5) Under the above statutory provisions, the rule announced by the Supreme Court of the United States in the Goodman case, *supra*, may be an appropriate standard of care required of a person in crossing a railroad track, to be applied in actions to recover damages for personal injuries received by collision with a train at a railroad crossing, and neg-

ligence of the injured person may appear from his failure to observe the required standard, which would bar recovery under the law in some states, see *Penn. R. Co.* v. *Rusynik* (Ohio), 159 N. E. 825; yet, under the Florida statute, if an injury is duly alleged and shown to have been caused by the running of a railroad company's train, there may be a recovery for damage done, unless the company shall make it appear that its employees exercised all ordinary and reasonable care and diligence in the premises, *Tampa El. Co.* v. *Bazemore*, 85 Fla. 164, 96 So. 297; but if it appears that the injury was caused solely by the negligence of the party injured, there can be no recovery, *S. A. L. Ry. Co.* v. *Myrick*, 91 Fl., 918, 109 So. 193; *S. A. L. Ry. Co.* v. *Toberlin*, 70 Fla. 435, 70 So. 437; *Tampa El. Co.* v. *Bourquardez*, 72 Fla. 161, 72 So. 668; and, if both the injured and the employees of the railroad company were at fault in causing the injury, there may be a recovery, but the damages will be reduced in proportion to the contributory negligence of the injured party. *L. & N. Ry. Co.* v. *Norton*, 75 Fla. 597, 78 So. 982; *A. C. L. Ry. Co.* v. *Weir*, 63 Fla. 69, 58 So. 641, 41 L. R. A. (N. S.) 307, Ann. Cas. 191A, 126; *Davis* v. *Cain*, 86 Fla. 18, 97 So. 305; *Stevens* v. *Tampa Elec. Co.* 81 Fla. 512, 88 So. 303; *S. A. L. Ry.* v. *Callan*, 73 Fla. 688, 74 So. 799, 35 S. Ct. 654, 59 L. Ed. 1069; Ann. Cas. 1914C, 172, 109 So. 432."

We emphasize the language of Mr. Justice Hutcheson's separate dissenting opinion at Record page 103:

"In *Claughton* v. *Atlantic Coast Ry.*, 47 Fed. (2) 679, this Court correctly announced and applied the Florida rule that while the sole negligence of a father is a bar to recovery for a crossing injury, contributory negligence is not. Such negligence bars neither the driver nor those in the vehicle with him. It merely diminishes the amount of the recovery of those negligent or responsible for the nigligence. *Bradley* v. *Mo. Pac. Ry.*, 288 Fed. 484. The opinion of the ma-

jority advances a third view as maintainable in Florida, that there are degrees of contributory negligence, and that a driver may be so contributory negligent as that though the recovery of those in the car with him will not be barred because his negligence is not the sole but a concurring proximate cause of the injury, his own recovery will be. I find no warrant in the Florida statute nor in any of its decisions, for this view. I think it overrules the Claughton case. I respectfully dissent from it."

It is conceded that the railroad track is a proclamation of danger; that the traveler must stop for the train and not the train for the traveler, but it is not a proclamation that a train will run at a high rate of speed through a thickly settled community and over a much traveled street at 30, 40 or 50 miles per hour, without warning signals of its approach. To drive a train at a high rate of speed across a thoroughfare where the travel is heavy in the center of a town, where the view is obstructed, is undoubtedly an act of negligence. Stringfellow's fate, and that of his children, show the danger of it, and the case should have been submitted to the jury and especially so where there is a conflict in the evidence as to whether or not the whistle was blown. The Florida Supreme Court said in *Atlantic Coast Line R. R. Co.* v. *Jones* (Fla.), 123 So. 920:

"While the driver of the car was undoubtedly guilty of negligence, in driving upon the crossing in front of the approaching train, we cannot hold in this case as was held in *Egly* v. *S. A. L. Ry. Co.*, 84 Fla. 147, 93, So. 170, and *Atlantic Coast Line R. Co.* v. *Gornto*, 89 Fla. 97, 103 So. 117, that such negligence, under the peculiar circumstances of the case, was the sole proximate cause of the collision and resulting injury. *Per Contra*, the evidence clearly shows negligence on the part of the defendant railway company which the jury might well have found, as they apparently did, proximately con-

tributed, along with the negligence of the driver of the automobile and of the plaintiff himself, to the causation of plaintiff's injury."

"* * * the rights and obligations of a railroad company and travelers on a public highway are reciprocal at the crossing of a railroad and public highway, but the railroad company's trains have the right of way, and all persons on the highway should give precedence to the passing trains of the railroad company at the crossings. It is therefore as much the duty of a person traveling upon the public highway, who is about to cross a railroad track, to use ordinary care and prudence to ascertain if a train is approaching upon the railroad track *as it is the duty of the railroad company to warn, by appropriate signals, all persons who may be upon the public highway of the approach of a train about to cross the public highway.*"

Seaboard Air Line Ry. Co. v. *Myrick*, 91 Fla. 918, 109 So. 193, 195.

Can it be said upon the facts disclosed by this record that the railroad company performed its *reciprocal* duty to Stringfellow? The law charges Stringfellow with a standard of care to be observed in approaching this crossing and likewise the law charges the railroad company with a standard of duty in approaching this crossing. The Florida Supreme Court recognizes this standard of care but likewise it recognizes a *standard of duty* upon the railroad company. As said in the Germak case, *supra*, after quoting the language of Mr. Justice Holmes in the Goodman case, *supra*, "This rule has reference to the *standard of conduct* required by law of persons in crossing railroad tracks. It does not relate to the *standard of duty* imposed upon railroad companies *or define the liability* of such companies under a statute like the one in Florida." The respective standards of conduct and duty are mutual, reciprocal, due from each to each.

The railroad company was as much charged with notice of the conditions surrounding this crossing as was Stringfellow. It was charged with knowledge of the obstructed view, charged with knowledge of the consequences and danger of driving its train over this crossing, through a populous community without warning, or at a speed so great that it could not be stopped within less than 100 yards, charged with knowledge that because of a strong head wind it was made difficult for those using the street intersection to hear a train approaching from the south. It cannot be said upon this record, as a matter of law, that the railroad company, performed its *reciprocal standard of duty.* Otherwise the proof of the railroad cempany's negligence offered at the trial must be completely ignored.

The statute and decisions of Florida impose this *standard of duty* upon the railroad company along with the *standard of conduct* upon Stringfellow.

> "Likewise the defendant is held to knowledge of the obstruction to the view of approaching vehicles at or near the crossing, and in approaching the crossing should have given due and ample warning commensurate with the danger arising from the obstruction. See *So. Ry. Co.* v. *Mann,* 91 Fla. 948, 108 So. 889; *A. C. L. R. R. Co.* v. *Jones,* 98 Fla. 47, 123 So. 920."
>
> *Florida East Coast Ry. Co.* v. *Townsend* (Fla.), 140 So. 196, 198.

In the Watkins cases, *supra,* a recovery was allowed although the Supreme Court of Florida said, 121 So. at bottom of page 101: "While we think that both the company and its engineer were at fault in the lack of reasonable prudence with which the train was operated that point, the degree of negligence and lack of prudence shown by Mr. Watkins was *vastly greater.*"

> "The question of whether the defendant railroad company has failed to observe ordinary caution

through its agents, and whether such failure is the proximate cause of the injury is a question for the jury."

S. A. L. R. R. Co. v. *Myrick*, 91 Fla. 918, 109 So. 193.

"The question of negligence in the operation of a train at a crossing is one which must be resolved by consideration of many things, including condition of machinery and track in relation to speed, environment at point of accident, speed in relation to environment, and signals of the trains approach." *Atlantic Coast Line R. Co.* v. *Watkins*, 97 Fla. 350, 121 So. 95.

Seaboard Air Line Ry. Co. v. *Watson* (Fla.), 137 So. 719, 721.

We respectfully submit that because of these decisions and the evidence adduced upon the trial petitioner was entitled to have her case submitted to a jury because in the language of the majority opinion below (R. 96, 97) "there was substantial evidence, tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run the train through a populous community without warning, or at a speed so great that it could not be stopped within less than 100 yards; especially if because of a strong headwind it was made difficult for those using the street intersection to hear a train approaching from the south. * * * here it was opened for the jury to find that appellant's husband did not know or realize that a train was approaching. It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing."

It was therefore open for the jury to find that respond-

ent was also guilty of negligence which contributed to Stringfellow's death. It cannot be said from the record that Stringfellow's negligence was more than a concurrent cause. The jury might well have found that his death was due in part to the negligence of respondent.

As said by Mr. Justice Roberts, in *Rocco* v. *Lehigh Valley R. Co.*, 77 Law Ed. 438, 440, decided February 6, 1933:

> "But it was open to the jury, as above shown, to find that the motorman of the train was also guilty of negligence which contributed to the collision. Rocco's infraction of the rule was a concurrent cause, but may not in any proper sense be held the primary cause of the accident. His negligence did not preclude a finding by the jury that his death was in part due to the negligence of the respondent's servants. The Act imposes liability upon the carrier for injury or death resulting 'in whole or in part' from the negligence of any of its officers, agents or employees (U. S. C. title 45, sec. 51)."

Section 7052, *supra*, likewise imposes liability upon the respondent in this case, for injury or death resulting *in whole or in part* from the negligence of any of its agents or employees.

Conclusion.

Petitioner therefore submits that there was evidence sufficient for the jury to reasonably have concluded that some appreciable negligence of the railroad company proximately contributed to the death of her husband, and under Section 7052, she was entitled to have the issues submitted to a jury.

Respectfully submitted,

DOYLE CAMPBELL,
WM. C. MCLEAN,
Attorneys for Petitioner.

(4135)

FILE COPY

FILED
JUN 26 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 71

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, RESPONDENT.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JAMES R. BUSSEY,
SAM H. MANN, JR.,
MCKINNEY BARTON,
Attorneys for Respondent,
St. Petersburg, Florida.

F. B. GRIER,
Advisory Counsel,
Greenwood, S. C.

W. E. KAY,
General Solicitor,
Jacksonville, Florida.

INDEX.

Subject Index.

	Page
Questions presented	1- 2
Statutes involved	2
Statement	3- 7
Rulings of the court	8-16
The dissenting opinion of Circuit Judge Hutcheson	17-18
Conclusion	18-19

Cases Cited.

(A.)

Atlantic Coast Line R. R. Co. vs. Gornto, 89 Fla. 97, 103 Sou. 117	11
Ætna Fire Ins. Co. vs. Boone, 95 U. S. 117, 24 Law Ed. 395	16
Atlantic Coast Line R. R. Co. vs. Miller, 53 Fla. 246, 44 Sou. 249 (should be "247," see "249")	18

(B.)

B. & O. R. R. vs. Goodman, 276 U. S. 66, 72 Law Ed. 167	9

(C.)

Covington vs. Seaboard Air Line R. R., 99 Fla. 1102, 128 Sou. 426	12
Cole vs. German Savings & Loan Asso., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A., 416	16

(E.)

Egley vs. Seaboard Air Line R. R., 84 Fla. 147, 93 Sou. 170	11

(F.)

Florida East Coast Ry. Co. vs. Davis, 96 Fla. 171, 117 Sou. 842	12, 13, 14, 17, 18

(M.)

Milwaukee & St. Paul Ry. Co. vs. Kellogg, 94 U. S. 469, 24 Law Ed. 256	16, 17

(P.)

Page

Patton vs. Texas Pac. R. R. Co., 179 U. S. 658..... 7

(S.)

Seaboard Air Line R. R. vs. Tomberlin, 70 Fla. 435, 70 Sou. 437, Syl. 3..... 10

Southern Ry. Co. vs. Mann, 91 Fla. 948, 108 Sou. 889..... 13

TEXTBOOK AND ENCYCLOPEDIA CITED.

R. C. L., Vol. 20, par. 89, page 104..... 15

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 71

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Questions Presented.

Respondent most earnestly insists that there is no such question presented in this petition for certiorari as insisted upon by petitioner under the subject captioned "Questions Presented". In other words, the construction of Section 7051 and Section 7052 of the Compiled General Laws of Florida for 1927 is not involved herein. The only question that could be in-

volved in this record is whether or not the District Court and the Circuit Court of Appeals committed error in holding as a matter of law under the evidence in this case that the negligence of the petitioner's husband was the sole proximate cause of the accident, resulting in the death, and this question is not raised in the petition. It is erroneously assumed in the petition that the Circuit Court of Appeals determined the question of liability or non-liability upon the ground that under the evidence in this case the respondent was guilty of negligence proximately contributing to the accident that concurred with that of petitioner's husband. The Circuit Court of Appeals did not so hold.

While this Court is not interested in the discussion of academic questions, suffice to say that we agree with the propositions of law contended for by petitioner to the effect that where both the driver of an automobile and a railroad company are guilty of concurring negligence proximately contributing to an accident there may be a recovery under the Florida Comparative Negligence Statute, but that the damages should be diminished in proportion to the negligence of the driver of the automobile.

Statutes Involved.

Under the caption "Statutes Involved" petitioner sets forth in *hæc verba* Section 7051 and Section 7052 of the Compiled General Laws for 1927, but our statement in answer to petitioner's "Questions Presented" sets forth our contention with respect thereto, to-wit: the statute is not involved herein.

Statement.

It is correctly stated by petitioner that she in her own right, as widow, and as administratrix, brought five separate actions in the District Court of the United States, for the Southern District of Florida, against the respondent for negligently running its train upon and fatally injuring her husband and two minor children at a street crossing, and at the conclusion of all of the evidence the District Court directed verdicts for the railroad company; that there were five separate verdicts and five separate judgments; separate appeals were taken to the Circuit Court of Appeals on a single transcript and were docketed in the Circuit Court of Appeals as one case, argued as one case, and disposed of by a single written opinion. It is true that in the *opinion* the action of the District Court was affirmed insofar as the matter herein sought to be reversed was concerned and reversed as to the four cases growing out of the death of the minor children. However, only one *judgment* was entered in the said Circuit Court of Appeals, covering all five cases, dealing therewith as one cause, in which judgment it is recited "that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court" (R. 104).

It would seem that five separate judgments should have been entered in the Circuit Court of Appeals, and inasmuch as an appeal or certiorari should be sought from a judgment and not from an opinion, that peti-

tioner herein is seeking redress from a judgment in her favor rather than an affirmance as complained of in the petition. However, we take it that petitioner's rights, if any, should not be prejudiced by failure of the Circuit Court of Appeals to enter the proper judgment based upon its opinion, and that this Court will treat the judgment of reversal and remand of this cause "for such further proceedings not inconsistent with the opinion" as in effect a judgment of affirmance of the action of the lower court in directing the verdict. We are simply calling the court's attention to this state of the record before discussing the merits.

If we are correct in our reply to petitioner's discussion of "Questions Involved", a reply to petitioner's discussion of the Statement of the Case is unnecessary and that the petition for certiorari should be denied because the certiorari is not sought upon the ground that both the District Court and the Circuit Court of Appeals were in error in their finding that as a matter of law the sole proximate cause of the accident, the subject of this controversy, was the negligence of the driver of the vehicle, petitioner's husband.

However, we deem it proper to call this Court's attention to certain misstatements of fact contained in the petition which are not borne out by the record and to actual facts upon which the District Court and a jury were called upon to pass.

Under the subject title "Statement", it is said:

> "A satisfactory statement of facts is found in the opinion of the Circuit Court of Appeals (Record 134, 135), which we quote, but to which we have added in brackets the record page reference of the facts thus recited."

We can quite understand why the petitioner is satisfied with the statement of facts set forth in the opinion, but with the greatest deference and respect for the Circuit Court of Appeals, we unhesitatingly say that the statement of facts contained in said opinion and to which reference is made is absolutely in the most material matters in conflict with the actual facts contained therein.

We will briefly call the court's attention to some of these misstatements of fact. It is said:

> "The fireman (R. 93) testified that he saw appellant's husband drive upon the crossing about 60 feet in front of the engine."

The fireman did not so testify, nor could any such inference be drawn from anything he did testify. On the contrary, he testified:

> "I was sitting on my side and I got down about 30 or 40 feet from the crossing and saw this car coming up about the same distance from the crossing, and went right in front of the engine, and I jumped up and hollered to him to put on the emergency."
>
> "I hollered to the engineer, warning him of the danger when the engine was about thirty to sixty feet from the crossing."

Again, on cross-examination, the witness testified:

> "I told the engineer when we were about thirty to sixty feet before we got to the crossing. * * * When I first saw the automobile, it was about the same distance that we were from the track. I couldn't tell whether the automobile was going to stop" (R. 93).

In other words, this witness testified that when he, the fireman, was between thirty and sixty feet from the point where the accident happened, he saw this automobile coming, and it was about the same distance, to-wit, thirty to sixty feet from the point of the accident. No witness testified that the automobile was on the crossing sixty feet in front of the engine.

Again, it is said:

> "But the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train."

There is not a line of evidence that he stopped.

The plaintiff introduced one person, who claimed to be an eye-witness, a Mrs. Crystal Towne, who said that she was about one hundred and fifty feet from the railroad track, and said that she saw the train strike the car (R. 86). This witness did not state, even by any inference, that the automobile stopped, or that she saw it, other than at the very moment of the collision.

The other eye-witnesses were: Mrs. Mabel Seeley, who testified that he did not stop, but that he slackened his speed a little, and he then speeded up across the tracks (R. 97-98).

E. H. Baldwin testified, on direct examination, that he drove right in front of the train, and that as well as he can tell he did not slow up, or stop, from the time he first saw him. On cross-examination, he testified:

> "I know he slackened the speed of his car some but not very much" (R. 106).

Ray Outman, a negro, and an eye-witness, testified that he saw the automobile before it got to the track, and that it did not stop or slacken its speed before it went upon the track (R. 107).

The fireman, A. R. White, testified that from the time he first saw the automobile until the time of the crash, it did not slow up, or stop, or change its speed any (R. 93).

Therefore, it cannot be said to be uncertain as to whether or not he stopped. The evidence is uncontradicted that he did not stop.

There are certain exhibits in the record showing the situation that existed at the time of the accident which will aid the court materially, and it must be remembered that the trial court had the same opportunity as jurors have for seeing the witnesses, for noting all those matters not capable of record, and it was his deliberate opinion that there was no excuse for a verdict, save in favor of the defendant, and so instructed the jury (*Patton* v. *Texas Pac. R. R.*, 179 U. S. 658).

We take it that it is not necessary to discuss further the actual facts of the case as presented to the jury, because even upon the facts set forth in the opinion of the Circuit Court of Appeals, which alleged facts we most respectfully and deferentially submit bear most harshly and unjustly upon the defendant, the Circuit Court of Appeals found, as did the District Court, that the accident was brought about solely through the negligence of the driver of the vehicle, and having so found the action of the District Court was therefore affirmed.

Rulings of the Court.

Under the subject index, entitled "Rulings of the Court Below", it is correctly stated that the District Court directed a verdict for the respondent upon the ground that the injuries complained of were caused solely by the negligence of petitioner's husband, and we respectfully submit that the Court of Appeals, in affirming its judgment, based its affirmance upon the same ground, to-wit, that the negligence of the driver of the vehicle was the sole proximate cause of the accident.

It must be borne in mind that the Circuit Court of Appeals in its opinion, and by this we mean the majority opinion, had before it five separate alleged causes of action, and in its opinion rendered judgment in said five separate causes of action, but in doing so that said Circuit Court of Appeals first discussed the case, the subject of this petition, and thereafter discussed the four cases which involved the death of petitioner's children, and we respectfully challenge lawyer or layman to read that part of the opinion dealing with the case involved in this petition, to-wit, the alleged cause of action of the petitioner for the death of her husband, and come to any other conclusion than that the Circuit Court of Appeals was of the same opinion as the District Court, to-wit, that the sole proximate cause of the accident, resulting in the death of petitioner's husband, was the negligence of petitioner's husband. The opinion of the majority of the Circuit Court of Appeals, after setting forth the facts generally surrounding the happening of the accident, and

then certain specific statements of fact not borne out by the record, as hereinabove pointed out, said:

> "Her husband as driver of the automobile was under the duty of exercising the care and caution which a reasonably prudent man would have displayed under the same or similar circumstances. It therefore was his duty to use his senses of sight and hearing before undertaking to cross the railroad tracks. If when he had passed the trees and had an open view down the track, he had looked, he would have seen the train and could have avoided the collision. A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching train. Notwithstanding Section 7052, he could not have recovered for an injury, and so recovery cannot be had on account of his death."

This holding was undoubtedly based upon the decision of this Court in the case of *B. & O. R. R. Co.* v. *Goodman,* 275 U. S. 66, 72 Law Ed. 167; in other words, under the assumed state of facts, the Circuit Court of Appeals held that the negligence of the driver of the vehicle was the sole proximate cause of the accident. As a matter of fact the record disclosed that the automobile was not driven upon the track 60 feet in front of the engine, that the driver of the automobile did not stop before entering upon the track, but, on the contrary, slackened his speed, looked in the direction from which the train was approaching, and speeded up across the track. These were the facts presented to the jury and the trial court upon which a verdict was

directed in favor of the defendant, and we say, Can it be doubted, that if these facts are true, that as a matter of law the sole proximate cause of the accident was the negligence of the driver?

It is true that in discussing the case of the driver, the only case involved in this petition, it was not stated in the majority of the opinion of the Circuit Court of Appeals that the negligence of the driver was the sole proximate cause of the accident, yet, on the contrary, it was not stated that any negligence of the defendant proximately contributed to produce the accident, and the Circuit Court of Appeals, after arriving at the conclusion that plaintiff could not recover for the death of her husband, cited as authority for the proposition thus laid down those decisions of the Supreme Court of Florida, in every one of which the determinative factor was that the accident in question was brought about by the negligence of the plaintiff which was the sole proximate cause, and in none of which was the question of contributory negligence involved. Those cases are as follows:

Seaboard Air Line R. R. Co. v. *Tomberlin,* 70 Fla. 435, 70 Sou. 437, Syllabus 3:

> "In a suit against a railroad company for damages for personal injuries sustained in attempting to cross a railroad track at a street crossing, where the evidence affirmatively shows that the plaintiff failed to exercise that degree of prudence which the known risks required, but negligently rode a motorcycle upon the railroad track in front of an approaching train, the speed of the train cannot be considered the proximate cause of the injury."

In the case of *Egley* v. *Seaboard Air Line R. R. Co.*, 84 Fla. 147, 93 Sou. 170, the syllabus is:

> "One who approaches a railroad crossing in an automobile at a point where an approaching train may be seen at a great distance and fails to wait for the passing of the train which may be seen approaching before undertaking to cross, but drives his automobile slowly upon the track in front of the approaching train, cannot be said to have exercised reasonable precaution for his own safety, and not to have been the sole cause of his own injury, if he sustains any by the train."

In the case of *Atlantic Coast Line R. R. Co.* v. *Gornto*, 89 Fla. 97, 103 Sou. 117, a case very much like the case at bar, held that one who failed to exercise the degree of prudence which the known risks required and negligently attempted to pass over a crossing in front of a rapidly approaching train, there could be no recovery by him, and then used this language:

> "The accident occurred in the daytime. It was a prominent and frequently used crossing. The plaintiff, who was driving the car, was familiar with the crossing. He was, so far as the evidence discloses, in possession of his normal senses. Upon the question of whether the whistle was blown or the bell rung, or other signal given by the train on its approach, there is conflict in the evidence. But from the evidence including photographs of the crossing and its environs, contained in the record, it appears that for some distance before reaching the crossing the view from the highway in the direction from which the train was coming was un-

> obstructed, so that its approach was obvious to one exercising his normal faculties of sight and hearing."

In the case of *Florida East Coast Ry. Co.* v. *Davis*, 96 Fla. 171, 117 Sou. 842, the court held that the negligence of the plaintiff was the sole proximate cause of the injury, and used this language:

> "Had there been negligence of the defendant railroad company in operating its train as alleged, which appreciably contributed to causing the injury, the defendant would be liable for damages under the statute, even though negligence of the plaintiffs also proximately contributed to the injury; the recoverable damages being diminished in proportion to the default attributable to the plaintiffs."

In the case of *Covington* v. *Seaboard Air Line R. R. Co.*, 99 Fla. 1102, 128 Sou. 426, which was an action, by a minor riding with his father, against the railroad company for injuries sustained at a crossing collision, in the opinion of the majority of the court, it was said:

> "By the exercise of reasonable prudence Mr. Covington could have seen the approaching train in time to have stopped his automobile which was under control. His failure to use such precaution would preclude the plaintiff from recovering for the injury sustained."

Mr. Justice Brown, evidently thinking that the opinion of the majority of the court might be susceptible of the construction that the negligence of the father was imputed to the minor children, used this language:

> "I do not think that the negligence of the father, the driver of the car, was imputable to the young son, who, by next friend, was the plaintiff below. But the real question was whether the injury to the plaintiff was caused by the concurring negligence of the defendant and the plaintiff's father, or was the negligence of the father the sole proximate cause of such injury. *Seaboard Air Line R. Co.* v. *Watson,* 94 Fla. 571, 113 Sou. 715. The evidence so strongly preponderated to sustain the plea that the collision and injury was due solely to the negligence of the father that this court would not be authorized to hold the lower court in error in granting the motion for new trial."

In the case of *Southern Ry. Co.* v. *Mann,* 91 Fla. 948, 108 Sou. 889, after reviewing the evidence, used this language:

> "By the well-established rule of this court, the record not only exhibits the degree of flagrant carelessness on the part of the plaintiff as would bar recovery, but we think it meets and rebuts the presumption of negligence cast on it by the law, and shows that the agents of the defendant exercised all ordinary and reasonable care and diligence in approaching the crossing."

These are the cases cited by the court to sustain its opinion in affirming the action of the District Court. And that the Circuit Court of Appeals thus construed the evidence as establishing the fact that the negligence of the driver was the sole proximate cause of the accident cannot be doubted when it is seen that in the case cited by it of *Florida East Coast Ry. Co.* v.

Davis, supra, the Supreme Court of Florida, in discussing the Comparative Negligence Statute, said in language which cannot be misunderstood that where there has been negligence of the defendant appreciably contributing to causing injury, the defendant would be liable, even though the negligence of the plaintiff also contributed to the proximate cause of the injury. Yet, in that very case, with that construction before it, the Supreme Court of Florida held that the negligence of the plaintiff was the sole proximate cause; and, in citing this case as authority for the position they took, the Circuit Court of Appeals undoubtedly had in mind the rule of law thus laid down in that case.

The astonishing feature of the opinion of the Circuit Court of Appeals is that part of its opinion dealing with alleged causes of action not involved in this petition, wherein the Circuit Court of Appeals reversed the District Court for those alleged causes of action growing out of the death of the minor children, on the theory that the jury might reasonably have concluded that the deaths of the children were caused by the combined or concurrent negligence of their father and the Railroad Company. Suffice to say, respondent in this cause has, as petitioner in those cases, filed its petition for certiorari, the application for which is now pending in this Court, it being the theory of petitioner in those causes that if the negligence of the driver of the vehicle was the sole proximate cause of the accident, that every result flowing from that accident was attributable to the same proximate cause.

The most plausible solution of the incongruous position taken by the Circuit Court of Appeals is that they

held that the driver of the car had the last clear chance to avoid the accident resulting in his death, and, therefore, his act became the proximate cause of the accident and any negligence of the railroad became a remote cause, but that the negligence of the driver, not being imputable to the children therefore the concurring proximate negligence of the driver with that of the remote negligence of the railroad company transformed the railroad's remote negligence into a proximate cause. This is not the law.

A clear statement of the law will be found in *R. C. L.*, vol. 20, par. 89, pg. 104, wherein it is said:

> "Again, unless the ultimate injury is the natural and probable consequence of the defendant's act of negligence, that act is not the proximate cause of the injury, and no action can be maintained upon it, whether the succeeding injury results from that act alone or from that act and the concurring or succeeding negligence of a stranger. In other words, the concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that it is not actionable into a cause so proximate that an action can be maintained upon it. It cannot create a liabiliay against one who does not legally cause it, or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence."

After all, the so-called "last clear chance" doctrine is a method of determining the proximate cause, and whether it is called "last clear chance", "intervening cause" or "efficient cause" is immaterial. (*Milwaukee*

& St. Paul Ry. Co. v. *Kellogg,* 94 U. S. 469, 24 Law Ed. 256; *Ætna Fire Insurance Co.* v. *Boone,* 95 U. S. 117, 24 Law Ed. 395.

Circuit Judge Sanborn, in the case of *Cole* v. *German Savings and Loan Association,* 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A., page 416, discussed very learnedly the question of proximate cause and intervening causes, and made this pertinent observation:

> "It is now no longer difficult to determine whether or not the acts of the defendant were the proximate cause of the injury to the plaintiff. Wharton says: 'Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that casual connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter (as to which I am not contractually bound). Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured.' "

So that we insist that if the Circuit Court of Appeals were predicating their action in reversing the causes, involving the death of the minor children, on the

theory that because the children were guilty of no negligence that the negligence of the railroad company, which was as to the driver a remote cause, was thereby transformed into a proximate cause, it is illogical and unsound and not supported by any authority.

The Dissenting Opinion of Circuit Judge Hutcheson.

The theory of petitioner is that the Circuit Court of Appeals held that although the defendant was guilty of negligence which appreciably contributed to the happening of the accident and causing the injury, yet there can be no liability by reason of his contributory negligence, and the only basis for such contention can be found in the dissenting opinion of Circuit Judge Hutcheson. Certainly the majority of the Circuit Court of Appeals would not have cited, as sustaining the proposition advanced, the case of *Florida East Coast Ry. Co. v. Davis, supra,* which held exactly contrary to this contention.

An examination of the dissenting opinion of Circuit Judge Hutcheson, in which he construed the majority to hold that the negligence of the respondent was a concurring proximate cause with the negligence of the driver, demonstrates clearly that the majority opinion does not so hold, but, on the contrary, bases its action upon the ground that the negligence of the driver was the sole proximate cause of the accident. To contend otherwise, is to charge the majority of the court with having cited authorities to sustain a proposition which are not only inapplicable, but hold exactly contrary to the proposition advanced. For instance, it is said in

this dissenting opinion that every decision cited by the majority is based on the case of *Atlantic Coast Line R. R. Co.* v. *Miller*, 44 Sou. 249 (should be "247—see 249"). He is undoubtedly correct in this assumption, and following that case is cited that of *Florida East Coast Ry. Co.* v. *Davis*, 96 Fla. 171, 117 Sou. 842, in which the Supreme Court of the State of Florida declares the correct construction of the Florida Comparative Negligence Statute, but said that in that particular case it was not applicable because the negligence of the driver was the sole proximate cause. The opinion of Circuit Judge Hutcheson as to the law in Florida and the decisions of the Supreme Court referred to by him are absolutely sound and the established law of the State of Florida, but his opinion, taken in connection with the authorities cited, conclusively demonstrates that the majority opinion does not

> "advance a third view as maintainable in Florida, that there are degrees of contributory negligence * * *."

We cannot conceive of the Circuit Court of Appeals as having advanced a proposition of law and in support thereof having cited authorities holding exactly contrary thereto.

Conclusion.

There can be no great importance attached to the question presented in this petition for certiorari. There is no rule of law or construction of the Florida Comparative Negligence Statutes involved, because there is no dispute as to its proper construction. We quite agree with every authority cited by petitioner in

her brief in support of the petition, but say that she is discussing an academic question not involved herein, and that the sole question which could possibly be raised on this record is whether or not the District Court was correct in determining as a matter of law that the sole proximate cause of the accident was the negligence of the driver of the vehicle—plaintiff's husband; and the Circuit Court of Appeals, having affirmed the action of the District Court in this respect, this Court should not be asked to review this cause on her petition for certiorari.

Respectfully submitted,

JAMES R. BUSSEY,
SAM H. MANN, JR.,
MCKINNEY BARTON,
Attorneys for Respondent,
St. Petersburg, Florida.

F. B. GRIER,
Advisory Counsel,
Greenwood, S. C.

W. E. KAY,
General Solicitor,
Jacksonville, Florida.

INDEX.

Subject Index.

	Page
Opinion and judgment below	1
Statement of the case	2
Specifications of error	2
Statute involved	3
Reply to specification of error No. 1	3
Concurrence of the circuit court of appeals with the district court	3
The pleadings	3
Theory on which case was tried	3
Grounds of motion for directed verdict	4
Action of court on motion for directed verdict	4
Statement of circuit court of appeals as to issues involved	4
Decision of circuit court of appeals on these issues	5
Authorities cited by circuit court of appeals in support of its decision	6
Proposition of fact on concurrence of district court and circuit court of appeals	6
Propositions of law applicable thereto	7
Reply to specification of error No. 2	7
Proximate cause, a question of law in this case	8
The evidence upon which directed verdict was given	8
Undisputed facts	8
Disputed facts	11
Speed	11
Warning signals	11
Vision	12
Conclusion	13

Cases Cited.

(a)

Atlantic Coast Line R. R. Co. v. Gornto, 89 Fla. 97	6
Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 62 Law Ed. 1096	8

(b)

Michael U. Boemer v. Pennsylvania Railroad Co., 252 U. S. 496, 64 Law Ed. 680	7

(c)

Covington v. Seaboard Air Line Ry., 99 Fla. 1102	6
Chicago Junction Ry. Co. v. William R. King, 222 U. S. 222, 56 Law	

Page

Ed. 173 7
Chicago & North Western Ry. Co. v. Andrews, 130 Fed. 65, 70 11
Chicago, Rock Island & Pacific R. R. Co. v. Houston, 95 U. S. 697, 24 Law Ed. 542 13

(n)

Northern Pacific Railroad Co. v. Freeman, 174 U. S. 379, 43 Law Ed. 1014 11
New York Central R. R. Co. v. Antonia Ambrose, as Admx., etc., 280 U. S. 486, 74 Law Ed. 562 14

(p)

Pennsylvania Railroad Co. v. Margaret V. Chamberlain (decided by this Court February 13, 1933), 77 Law Ed. 503 (see pages 506-507) 14

(s)

Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 507, 68 Law Ed. 413 8
Seaboard Air Line Ry. Co. v. Tomberlin, 70 Fla. 435 6
Southern Ry. Co. v. Mann, — Fla. —, 108 Sou. 889 6

(t)

Texas & New Orleans R. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548, 74 Law Ed. 1034 7
Telfer v. Northern R. R. Co., 30 New Jersey Law Reports, page 188, see page 196 13

(w)

Waters-Pierce Oil Co. v. Van Elderen et al., 137 Fed. 557 8
Webster Electric Co. v. Splitdorf Electric Co., 264 U. S. 463, 68 Law Ed. 792 8

TEXTBOOKS CITED.

Moore on Facts, Vol. 1, Par. 281, page 296 13
Par. 192 14

TEXTBOOK CITED.

Compiled General Laws, 1927, Sec. 7052 6

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 71

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF RESPONDENT.

I.

With the statement of petitioner in her brief captioned "OPINION AND JUDGMENT BELOW" we quite agree.

II.

With the statement in her brief captioned "JURISDICTION" we, likewise, agree.

III.

With the "STATEMENT OF THE CASE", so captioned in petitioner's brief, we most respectfully disagree, and state that the record does not show the facts to be as therein set forth. However, before setting forth our views as to these facts we think a correct statement of the issues and of the findings of the court below will save much time and useless discussion.

IV.

Under the caption "SPECIFICATION OF ERRORS" No. 1 it is said that the court of appeals erred in holding that petitioner could not recover, notwithstanding the fact that the evidence did not establish as a matter of law that the husband's negligence was the sole proximate cause of the injury; and

No. 2, in holding that petitioner was not entitled to have the question of her right of recovery submitted to the jury.

In answer to Specification No. 1, we respectfully submit that the circuit court of appeals did not so hold, and should not have so held, but, on the contrary, concurred with the district court in holding that the sole proximate cause of this accident, resulting in the death of plaintiff's husband, was his own negligence, and that respondent was without fault.

In answer to Specification No. 2, we say that if it is sought thereby to have this Court review the facts found by the district judge and concurred in by the circuit court of appeals, that this writ of error should be dismissed, because the petition for certiorari was not sought on this ground nor granted upon this ground. Secondly, that a review of the facts as they actually existed, and as shown by the record, will conclusively show that no question for the jury was presented.

V.

Under the caption "STATUTES INVOLVED", the Florida Statutes are correctly quoted, but neither their construction nor application are in any way involved herein.

ARGUMENT.

Reply to Specification of Error No. 1.

Concurrence of the Circuit Court of Appeals with the District Court.

The district court directed a verdict upon the ground that there was no negligence of the defendant which proximately contributed to the accident (R., p. 90). This is, likewise, conceded by petitioner's brief in her application for certiorari. (See page 5 of printed brief.)

Inasmuch as it seems to be argued with a great deal of enthusiasm, and at length, that the circuit court of appeals held that the negligence of the defendant was a concurring, proximate cause, we may well examine the pleadings, the contentions of plaintiff and defendant, and the opinion of the circuit court of appeals on those pleadings and contentions, and the authorities cited by that court to sustain its ruling.

(A) THE PLEADINGS.

The declaration in this cause alleged negligence generally and specific acts of negligence in five counts (R., ppgs. 25 to 35). The plea of the defendant was—Not Guilty (R., p. 35). There was no plea of contributory negligence in any aspect.

(B) THEORY ON WHICH CASE WAS TRIED.

On the trial of the case the defendant, through its attorney, was attempting to elicit the facts with respect to the

happening of the accident in order to sustain its plea, and asked the following question:

> "Q. Please state in your own way where you were, what you were doing, what you heard and what you saw?" (R., p. 70.)

Thereupon attorney for plaintiff objected upon the ground that the question tended to elicit from the witness evidence tending to show contributory negligence when the defense had not been pleaded.

The lower court in overruling this objection stated that in a plea of general issue the defendant may show that the plaintiff's negligence was the proximate cause of the injury; that there was no question of comparison because it was not raised in the pleadings.

(C) Grounds of Motion for Directed Verdict.

At the conclusion of all of the evidence in the case, the defendant moved for a directed verdict upon the ground that there was no evidence of any negligent act of the defendant which was the proximate cause of the injury. Secondly, that the proximate cause of the injury was the negligence of the driver (R., p. 88).

(D) Action of Court on Motion for Directed Verdict.

The ruling of the district court thereon was, as is conceded in petitioner's brief, that there was no evidence of any negligence of the respondent that in any way contributed to the accident (R., p. 90).

(E) Statement of Circuit Court of Appeals as to Issues Involved.

The circuit court of appeals in its opinion, after stating generally the nature of the actions, the negligence alleged,

the plea of the defendant, the action of the trial court in directing a verdict, stated:

> "Appellant contends in support of her assignments that it was error to take the case away from the jury" (R., p. 93).

The opinion then purports to state the facts as disclosed by the record, which purported statement we most respectfully and deferentially submit does an injustice to the defendant in material particulars, as shown by the record. (The assumption of the correctness of said statement probably accounts for the dissenting opinion of Circuit Judge Hutcheson.)

The circuit court of appeals thereupon states the contention of the appellee, as follows:

> "It is appellee's contention that the presumption of its negligence, which arose under that action, upon proof of the injuries as alleged, was overcome by further proof which disclosed that those injuries were caused solely by the negligence of the injured persons, and that the case presented is not one which calls for the application of the rule prescribed in Section 7052 for apportionment of damages, because no fault was attributable to it" (R., p. 95).

(F) Decision of Circuit Court of Appeals on These Issues.

The circuit court of appeals thereupon made its ruling upon these contentions, as follows:

> "A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching train. Notwithstanding Section 7052 he could not have recovered for an injury, and so recovery cannot be had on account of his death" (R., p. 96).

(G) Authorities Cited by Circuit Court of Appeals in Support of Its Decision.

As authority supporting these contentions, the circuit court of appeals cited:

"*S. A. L. Ry. v. Tomberlin*, 70 Fla. 435.
Egley v. *S. A. L. Ry.*, 84 Fla. 147.
A. C. L. Ry. Co. v. *Gornto*, 89 Fla. 97.
F. E. C. Ry. v. *Davis*, 96 Fla. 171.
Covington v. *S. A. L. Ry.*, 99 Fla. 1102.
Southern Ry. Co. v. *Mann*, — Fla. —, 108 Sou. 289" (R., p. 96).

Propositions of Fact on Concurrence of District Court and Circuit Court of Appeals.

The circuit court of appeals concurred in its finding of facts as disclosed by the record, that the defendant was not guilty of any negligence, the proximate cause of this accident, because:

(*a*) The pleadings raised only the question of proximate cause, not contributory negligence, either simple or gross.

(*b*) The circuit court of appeals in its opinion, by setting forth the contention of the plaintiff and then that of the defendant, thus made the issue to be decided, to-wit: Was any fault to be attributed to the defendant or was the accident an injury caused solely by the negligence of the injured persons?

(*c*) Its ruling that no recovery could be had, notwithstanding Section 7052, demonstrates that it found the defendant was guilty of no negligence, the proximate cause of the accident, and that the accident was caused solely by the negligence of the driver, petitioner's husband.

(*d*) The cases cited in support of this ruling are all cases dealing with the question of sole proximate cause and the

rulings thereon being based upon such contentions, and in which cases the rule with respect to the concurring negligence of the defendant was fully set forth and explained, thus demonstrating that the court had in mind the Comparative Negligence Statute and the effect thereof, when the defendant was guilty of concurring negligence.

Propositions of Law Applicable Thereto.

The facts found by the District Court were that there was no negligence on the part of the railroad that in any way contributed to the accident. The Circuit Court of Appeals concurred in this finding. Therefore, this Court will accept the concurrent judgment of the lower courts that the respondent was not guilty of negligence proximately contributing to the injury.

Chicago Junction Ry. Co. v. *William R. King*, 222 U. S. 222; 56 Law Ed. 173.

Michael U. Boemer, v. *Pennsylvania Railroad Co.*, 252 U. S. 496; 64 Law Ed. 680.

Texas & New Orleans Railroad Co. v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548; 74 Law Ed. 1034.

Reply to Specification of Error No. 2.

If we are correct in the position we have taken, that there is a concurrent finding of facts of the two lower courts, the petitioner is not entitled to a review of this Court of those facts to determine whether or not the lower courts were in error in so finding, because the petitioner for writ of error was not sought upon this ground but only upon the ground that while the district court held there could be no recovery because the defendant was without fault, the circuit court of appeals held that there could be no recovery notwithstanding the defendant was guilty of concurring negligence.

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 507; 68 Law Ed. 413.

Alice State Bank v. *Huston Pasture Co.*, 247 U. S. 240; 62 Law Ed. 1096.

Webster Electric Co. v. *Splitdorf Electric Co.*, 264 U. S. 463; 68 Law Ed. 792.

Proximate Cause a Question of Law in This Case.

Should we be in error as to our position with respect to the concurrent finding of the two lower courts and the applicable law pertinent thereto, we say that a careful analysis of this evidence discloses that the directing of a verdict in this case was entirely proper.

We, of course, recognize the rule of law that where the proximate cause of an injury depends upon a state of facts from which different minds might draw different inferences, it is a proper question for the jury. The converse of this is equally true, where it is clear and undisputed beyond any persuasive evidence to the contrary that defendant's negligence was not the proximate cause or a proximate cause and that plaintiff's negligence was the sole proximate cause, the court should decide the question without leaving the jury to pass upon an issue of fact, or where under the testimony the cause of an accident resulting in a personal injury is conjectural merely, the case should not go to the jury.

See: *Waters-Pierce Oil Company* v. *Van Elderen et al.*, 137 Fed. 557.

The Evidence Upon Which the Directed Verdict Was Given.

Undisputed Facts.

Guy Stringfellow, husband of plaintiff, and plaintiff's two children, Hazel Stringfellow, seven years of age, and Jack

Stringfellow, nine years of age, met their death on March 9th, 1931, in a grade crossing accident in the incorporated town of Dunedin, Florida, the accident happening about 6:00 in the afternoon (R., p. 54-55).

The defendant's tracks ran north and south at this point and Scotland Street, upon which the accident happened, runs east and west (R., p. 56). The Dunedin railroad station, one block north of the scene of the accident, was a flag stop for this particular train, but which on occasions when not flagged slowed up for the purpose of taking on mail (R., p. 85).

Guy Stringfellow, the driver of the automobile in which his two children were riding, lived in the town of Dunedin, was familiar with the crossing and had crossed it frequently (R., pp. 74-75).

The automobile was traveling eastwardly upon Scotland Street and the train northwardly upon its right-of-way, crossing Scotland Street (R., p. 65).

After the collision with the vehicle, the train ran approximately 325 feet (R., p. 80).

There are cross-arms on Scotland Street approaching the crossing from either direction, marked "Railroad Crossing" (R., photograph, p. 92-131-A). There are three tracks at the intersection of this railroad and Scotland Street, the middle track being the main track upon which the accident happened, the gauge being four feet, four inches (4′, 4″), and the distance from the west line of the main track to the west line of the house track is fifteen feet, eight inches (15′, 8″). A stop sign protruding upward into the street a few inches was to the right of the middle of Scotland Street, going east, approximately twenty feet (20′) from the west rail of the house of west track (R., p. 64).

Guy Stringfellow was driving his car eastwardly upon Scotland Street, approaching the railroad crossing at a rate of speed of between ten or fifteen miles per hour (R., p. 68). He did not stop his automobile before entering the track (R., pp. 68-77-78-79-80).

He slowed up his automobile slightly, looked in the direction from which the train was coming and speeded up to cross the tracks, and was hit (R., p. 72).

At the time Mr. Stringfellow looked in the direction from which the train was coming, he had just passed the witness, Mrs. Seely, who at that time was on the north side of Scotland Street, walking eastwardly, toward the crossing (R., pp. 70-71).

At the time Mr. Stringfellow looked in the direction from which the train was approaching and then speeded up, Mrs. Seely was approximately ninety feet (90') from the crossing on the north side of Scotland Street, and looked and saw the train approaching (T., p. 72).

The best distance that a train of this character, traveling over this crossing, going at the rate of twelve or fifteen miles an hour, could be stopped, in the opinion of an expert, is 250 to 350 feet; going at a rate of speed of 35 miles an hour, could be stopped from 450 to 500 feet (R., p. 83).

The engineer, being on the right-hand side of the train, proceeding north, did not see the automobile until the happening of the accident (R., p. 65). The fireman, on the left-hand side of the engine, proceeding north, when within 30 to 40 feet of the crossing, saw the car approaching the crossing 30 or 40 feet therefrom, and called a warning to the engineer, who immediately applied the emergency brakes (R., pp. 67-68). From a point fifteen feet, eight inches of the west rail of the main line the view south is absolutely unobstructed (R., p. 61).

While there were some trees and shrubbery in the lot adjoining the right-of-way, the obstruction was not a great deal and was not very thick (R., p. 66).

See also photographs opposite page 92 of the record, to-wit:

131-A, 131-E, 131-F, 131-G, 131-L, 131-M.

Disputed Facts.

Speed:

As to the speed of the train, plaintiff's witnesses testified at a rate of speed of from 35 to 40 miles an hour (R., p. 57), while the defendant's witnesses testified at a rate of speed of from 10 to 15 miles an hour (R., p. 68).

Warning Signals:

There is an apparent conflict as to warning signals given by the respondent, but when we measure the testimony of the plaintiff's witnesses, who testified that they heard no signals, by the rule of law laid down by this Court in the case of *Northern Pacific Railroad* v. *Freeman,* 174 U. S. 379, 43 Law Ed. 1014, and as fully explained by the Circuit Court of Appeals of the Eighth Circuit, the apparent conflict disappears.

> "But where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see or hear, and where their situation was not such that they probably would have observed it, their testimony is not inconsistent with that of credible witnesses who were in a situation favorable for observation, and who testify affirmatively and positively to the occurrence. There is then no conflict."
>
> *Chicago & North Western Ry. Co.* v. *Andrews,* 130 Fed. 65, 70.

Two of the witnesses who testify as to hearing no bell or whistle testified that they heard the noise of the train com-

ing, to wit: George Smart (R., p. 61) and C. W. Cleary (R., p. 63).

Harry Lishness testified that he heard both the big whistle and the smaller whistle (R., p. 59).

Mary Mildred Smith, who was only one short block away from the scene of the accident and was in a position to hear and had occasion to hear, testified that she heard neither whistle nor bell and that the train was making no noise, yet she stopped to allow the train to pass (R., p. 58).

Mrs. Crystal V. Towne, who was about 150 feet from the crossing, and remained there several minutes before the happening of the accident, heard nothing, did not even see Mr. Stringfellow pass, but claims to have seen the actual collision at the instant thereof.

On the contrary, all of the employees of the defendant testified as to warning signals being given (R., pp. 64-85).

Likewise, Mrs. Mabel L. Seeley (R., p. 69), O. C. Howell (R., p. 75), E. H. Baldwin (R., p. 78), and Roy Outing (R., p. 79), all disinterested witnesses, and in a posititon to see and hear, testified to the affirmative fact as to the warning signals.

Vision:

One of plaintiff's witnesses testified that you could only see southwardly on Scotland Street when you reached a point on the side track which is shown to be fifteen feet, eight inches from the main track (R., p. 61).

Another of plaintiff's witnesses testified that while standing at the stop signal on the west side of the track, before the bushes were cut, he could see down the railroad track sixty-five feet (R., p. 86).

A defendant's witness testified that at the stop signal, which is shown to be a distance of 35 feet from the main track, you could see down the track 250 feet (R., p. 64).

Another witness testified that she was half way between the Smart home and the crossing, on the north side of the street, which is testified to as being 180 feet from the crossing, therefore making her 90 feet from the crossing—and she saw the approaching train at the time Mr. Stringfellow looked in the same direction and then speeded up (R., p. 72).

Conclusion.

We respectfully submit upon these facts that the conclusion is inevitable that the driver of this automobile, the plaintiff's husband, being familiar with the crossing, did not stop but looked and saw the train coming and undertook to cross instead of waiting for the train to pass. If this is true, the consequences of his mistake and temerity cannot be cast upon the Railroad Company.

Chicago, Rock Island & Pacific R. R. Co. v. *Houston*, 95 U. S. 697; 24 Law Ed. 542.

If it should be argued that he did not see the train, we call the Court's attention to the undisputed evidence that he looked toward the train from a position no more favorable for observation than Mrs. Seely, who looked and saw the train approaching (R., p. 72), and therefore the natural presumption is that he saw what Mrs. Seely saw.

Again, the fireman testified that when he was from 30 to 60 feet from the crossing, he looked and saw Mr. Stringfellow; therefore, Mr. Stringfellow could have seen him.

As said in an old opinion by the Supreme Court of New Jersey, in speaking of persons approaching the track:

> "and if they were, as the testimony shows, seen by those upon the train, they must have seen it, and should have waited until it passed."
>
> *Telfer* v. *Northern Railroad Co.*, 30 New Jersey Law Reports, page 188; see page 196.
>
> *Moore on Facts*, Vol. 1, page 296, Par. 281, wherein it is said:

> "Presumption that a Person could see what Others saw.—There is a natural presumption that a person with good eyesight saw or could have seen what others saw in no more favorable position for observation unquestionably saw."

If it be suggested that while testimony is undisputed that he looked, there is no testimony that he saw, we invoke the application of the presumption above stated, and also the rule of law that:

> "Where the proven facts give equal support to each of two inconsistent inferences, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recovery."
>
> *Pennsylvania R. R. Co.* v. *Margaret V. Chamberlain,* decided by this Court February 13, 1933; 77 Law Ed., page 503; see pages 506-507.

The burden of proof was on the plaintiff to show not only negligence on the part of the defendant, but that it was the proximate cause.

> *New York Central R. R. Co. v. Antonia Ambrose, as Admx., etc.,* 280 U. S. 486; 74 Law Ed. 562.

If it be suggested that he did not hear the warning signals, we invoke the presumption that:

> "Where a sound is heard by one person, the inference would be that all other persons of good hearing and having equal opportunity to hear, heard the sound also."
>
> *Moore on Facts,* Vol. 1, Par. 192.

We respectfully submit that while this Court, with its great burden of grave legal questions involving the Nation, should not be required to minutely examine and analyze a record involving matters of this kind, yet a close analysis

thereof discloses that the district court was correct in directing a verdict herein and that there is no error in the affirmance thereof by the circuit court of appeals, and that this Court will either dismiss the petition of certiorari heretofore granted herein or affirm the action of the circuit court of appeals in accordance with its opinion.

JAMES R. BUSSEY,
SAM H. MANN, JR.,
McKINNEY BARTON,
Attorneys for Respondent,
St. Petersburg, Florida.

F. BARRON GRIER,
Greenwood, S. C.
W. E. KAY,
Jacksonville, Florida.
Of Counsel.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari:	
Caption	1
Judgments below	2
Questions presented	5- 6
Statutes involved	8
Statement	6-12
Rulings of the court below	15
Reasons for granting the petition	16-17
Brief in support of petition:	
Opinions below	19
Jurisdiction	20
Statement of case	20
Specification of errors	21-22
Argument	22-29
Point I	22
Point II	24
Point III	26
Conclusion	29

Cases Cited.

(A.)

A. C. L. R. R. Co. v. Gornto, 80 Fla. 97, 105 Sou. 117 23
A. C. L. R. R. Co. v. Watkins, 97 Fla. 350, 121 Sou. 95 ..... 8, 24, 25
A. C. L. R. R. Co. v. Davis, 279 U. S. 34 27
Atchison, T. & S. F. R. Co. v. Saxon, 284 U. S. 458 (page 459) .. 8, 29

(C.)

Covington v. S. A. L. R. R. Co., 99 Fla. 1105, 128 Sou. 426 ..... 23, 26

(D.)

Del., L. & W. R. R. Co. v. Koske, 279 U. S. 7 27

(E.)

Egley v. S. A. L. R. R. Co., 84 Fla. 147, 95 Sou. 170 22

(F.)

F. E. C. R. R. Co. v. Davis, 96 Fla. 171, 117 Sou. 842 23

(G.)

Page
Gunning v. Cooley, 281 U. S. 90, 94 28

(H.)

Herron v. Sou. Pac. R. R. Co., 283 U. S. 91 27

(L.)

Little v. Hackett, 116 U. S. 366 23

(M.)

M. & R. V. Ry. Co. v. U. S., 270 U. S. 280, 285 27

(P.)

Penna. R. R. Co. v. Chamberlain, — U. S. —, 77 L. Ed. 503.. 20
Pleasants v. Fant, 22 Wall. 116, 122 27
Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, 660 ..... 17, 28

(S.)

S. A. L. R. R. Co. v. Tomberlin, 70 Fla. 435, 70 Sou. 437 22
Southern Ry. Co. v. Mann, 91 Fla. 948, 108 Sou. 889 23
Southern Ry. Co. v. Walters, 284 U. S. 190 ..... 17, 26
St. L. & S. F. R. Co. v. Mills, 271 U. S. 344 27
Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 369 27
Small Co. v. Lamborn & Co., 267 U. S. 248, 253 27

STATUTES CITED.

Judicial Code, Section 240 (a), as amended by Act of February 13, 1925, 43 Statutes, 938 (U. S. Code, Title 28, Section 347 (a)) 20
Compiled General Laws of Florida, 1927, Par. 7052 22

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 1000

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, PETITIONER,

vs.

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
AND AS ADMINISTRATRIX, ETC., RESPONDENT.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, Atlantic Coast Line Railroad Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit (No. 6617) entered on March 31, 1933 (R. 93), reversing four certain judgments of the United States District Court for the Southern District of Florida (Nos. 2730, 2731, 2732 and 2734) dismissing the complaints herein upon

the merits, with costs, after the direction of verdicts in favor of the defendant (R. 46-49).

Five actions, consolidated for trial in the lower court and heard in the Circuit Court of Appeals on the record in the consolidated cause, were brought by the respondent:

No. 2733. (*a*) As widow, to recover for the death of her husband,

No. 2731. (*b*) As surviving parent of Hazel Stringfellow, her minor daughter,

No. 2732. (*c*) As surviving parent of Jack H. Stringfellow, her minor son,

No. 2730. (*d*) By her in her representative capacity as Administratrix of the Estate of Hazel Stringfellow, and

No. 2734. (*e*) As administratrix of the estate of Jack H. Stringfellow.

The actions having been originally brought in the State court and removed to the Federal court by the defendant railroad company upon the ground of diversity of citizenship, where amended declarations were filed and issues made.

The causes were, by order of the trial court, consolidated and tried together, before the Honorable Alexander Akerman, District Judge, and a jury, upon the evidence submitted by both parties, resulting in directed verdicts for the defendant, petitioner here, in each of said causes (R. 88).

From such judgment appeal was taken by the respondent, *in forma pauperis*, to the United States Cir-

cuit Court of Appeals for the Fifth Circuit (R. 50) which, after hearing, affirmed the judgment of the District Court in cause No. 2733, being the action seeking to recover damages for the death of plaintiff's husband, and reversing and remanding causes Nos. 2730, 2731, 2732 and 2734, being the actions in which the plaintiff sought to recover in her personal right and also as administratrix for the death of her deceased minor children (R. 93-103). Petitioner filed petitions to rehear in those cases (R. 109) in which the Court of Appeals reversed and remanded said cause, and respondent likewise filed a petition to rehear (R. 106-109) in that cause in which the Court of Appeals affirmed the judgment of the lower court. Both petitions to rehear were denied by the Circuit Court of Appeals (R. 116). On motion of respondent, and with the consent of petitioner, an order of severance was entered in the cause of Sarah Elizabeth Stringfellow, a widow, in her own right, as widow, No. 2733, from all of her co-appellants for the purpose, as stated in the order, of filing a petition in the Supreme Court of the United States for writ of certiorari (R. 115).

A stay of the mandate was entered on the application of appellant (R. 118) and, likewise, a stay of the mandate was entered on application of the appellee (R. 119). The opinion of the Circuit Court of Appeals and the dissenting opinion of the Circuit Judge Hutcheson have not been officially reported.

These causes are typical grade crossing cases, the accident happening in the daytime upon a straight track, the view of which was only partially obstructed. Petitioner's motion for a directed verdict in the Dis-

trict Court was based upon want of evidence sufficient to establish the causes of action relied upon, in that:

(*a*). There was no evidence upon which a verdict for the plaintiffs could be predicated;

(*b*). It was shown by the undisputed evidence that the proximate cause of the accident and injury was due to the negligence of the driver of the vehicle to exercise any precaution before going upon the track;

(*c*). That the evidence conclusively shows that the driver of the vehicle as he approached the crossing failed to stop, but did look in the direction from which the train was approaching, at a point where the approaching train could have been seen, and then speeded up attempting to beat the train across (R. 88).

The only assignment of error pressed in the Circuit Court of Appeals in support of respondent's appeal questioned the propriety of the directed verdict for the defendant at the conclusion of the entire case (R. 51-53). There were assignments of error directed to the rejection and admission of evidence, but as we understand were not pressed in the Court of Appeals and were ignored by that Court in its opinion and judgment.

The Circuit Court of Appeals predicated its action in affirming the judgment of the District Court in No. 2733 on the theory that the sole proximate cause of the accident was the negligence of the driver of the vehicle, but, notwithstanding this, held that the right of recovery for the deaths of the children should have been submitted to the jury, and that the jury might reason-

ably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company (R. 96).

In the dissenting opinion by Mr. Justice Hutcheson it is stated that:

> "The opinion of the majority advances a third view as maintainable in Florida, that there are degrees of contributory negligence, and that a driver may be so contributorily negligent as that though the recovery of those in the car with him will not be barred because his negligence is not the sole but a concurring proximate cause of the injury, his own recovery will be."

However, the opinion of the majority does not bear out this construction, which we concede is without warrant in the Florida statute or in any of its decisions.

The contention of your petitioner is:

(A.) THAT THE CIRCUIT COURT OF APPEALS, HAVING FOUND THAT THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, RESULTING IN THE DEATH OF RESPONDENT'S HUSBAND, THE DRIVER OF THE VEHICLE, WAS THE DRIVER'S NEGLIGENCE, IT NECESSARILY FOLLOWS THAT THE DEATH OF RESPONDENT'S MINOR CHILDREN WAS BROUGHT ABOUT BY THE SAME ACT OF RESPONDENT'S HUSBAND, THE DRIVER OF THE CAR, WHICH ACT LIKEWISE MUST BE TAKEN AS A MATTER OF LAW AS THE SOLE PROXIMATE CAUSE OF THEIR DEATH; OR

(B.) IN THE EVENT THE OPINION OF THE MAJORITY OF THE CIRCUIT COURT OF APPEALS, IN AFFIRMING THE ACTION OF THE DISTRICT COURT IN SO FAR AS THE CAUSE OF THE DEATH OF RESPONDENT'S HUSBAND IS CONCERNED, AND REVERSING SAID CAUSES IN SO FAR AS THE DEATH OF RESPONDENT'S MINOR CHILDREN IS CONCERNED, IS BASED UPON THE CONSTRUCTION PLACED THEREON BY THE DISSENTING OPINION OF CIRCUIT JUDGE HUTCHESON, SUCH CONSTRUCTION IS UNTENABLE UNDER THE STATUTES AND DECISIONS OF THE STATE OF FLORIDA AND IS BASED UPON A SUPPOSITITIOUS STATEMENT OF FACTS IN CONFLICT WITH THE ACTUAL FACTS AS DISCLOSED BY THE RECORD.

Summary Statement of the Matter Involved.

Assuming, as we insist must be done, that the District Court and the Circuit Court of Appeals have found from all of the evidence that as a matter of law the sole proximate cause of the accident was the negligence of the driver of the car, it follows that every result flowing from said accident must be attributed to the same sole proximate cause. A contrary holding would bring this cause clearly within the rule laid down as to the discretionary jurisdiction of the Supreme Court under sub-paragraph B of Paragraph 5 of Rule 38 of this Court, in that said Circuit Court of Appeals "has decided an important question

of general law in a way probably untenable or in conflict with the weight of authority".

On the other hand, if it be assumed that the Circuit Court of Appeals based its action in reversing these four cases, sought to be brought up by certiorari, on the theory, as suggested by the dissenting opinion of Circuit Judge Hutcheson, that the cause of this accident, resulting in the death of the three persons, was the result of the concurring negligence of respondent's husband, the driver of the vehicle, and of the petitioner, the railroad company, and that while such a concurrent negligence of respondent's husband, the driver of the vehicle, would defeat her right of recovery in so far as his death is concerned, it would not defeat the respondent's right of recovery in so far as the deaths of her minor children were concerned, then this construction would clearly bring this cause within the discretionary jurisdiction of this Court by virtue of subparagraph B of Paragraph 5 of Rule 38 of this Court, in that the Circuit Court of Appeals would have decided an important question of local law in a way probably in conflict with applicable local decisions and that such a holding in view of the record in this case could only be based upon a supposititious statement of facts in conflict with the actual facts as disclosed by the record.

A mere statement of the question involved under the first assumption, to-wit: Does the sole proximate cause of an accident carry with it every result flowing therefrom? is its own answer and needs no citation of authority. An answer contrary to petitioner's conten-

tion could only result from a confusion of the words "cause" and "effect."

On the contrary, if the holding of the majority of the court is predicated upon the construction placed thereon by the dissenting opinion of Circuit Judge Hutcheson, this holding is in conflict with the statutes of the State of Florida and applicable local decisions (Compiled General Laws of the State of Florida for the year 1927, paragraph No. 7052; *A. C. L. R. R. Co.* v. *Watkins*, 97 Fla. 350, 121 Sou. 95) and such holdings can only be justified by a supposititious statement of facts in conflict with the actual facts as disclosed by the record.

Predicating the action of the Circuit Court of Appeals upon the construction placed thereon by the dissenting opinion of Circuit Judge Hutcheson, it is necessary briefly to review the evidence adduced (*Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458).

A number of witnesses testified as to the speed of the train, varying from twelve miles an hour to fifty miles an hour, and, likewise, a number of witnesses testified "pro and con" as to the ringing of the bell or the blowing of the whistle, but the view of your petitioner is that none of these acts was, or could be, considered as a proximate cause of the accident. The opinion of the majority of the court as to the statement of the facts does not reflect the facts as shown by the record.

(1) On page 3 of the printed decision of the court (R. 94) it is said:

> "The fireman testified that he saw appellant's husband drive upon the crossing about 60 feet in front of the engine, and that he called to the engineer who immediately put on the emergency brakes."

This is erroneous in that the fireman testified as follows:

> "I was sitting on my side and I got down about thirty or forty feet from the crossing and saw this car coming up about the same distance from the crossing and went right in front of the engine, and I jumped up and holloed to him to put on the emergency."
>
> "I holloed to the engineer, warning him of the danger when the engine was about thirty to sixty feet from the crossing."

Again, on cross-examination, the witness testified:

> "I told the engineer when we were about thirty to sixty feet before we got to the crossing. * * * When I first saw the automobile, it was about the same distance that we were from the track. I couldn't tell whether the automobile was going to stop" (R. 67-68).

In other words, this witness testified that when he, the fireman, was between thirty and sixty feet from the point where the accident happened, he saw this automobile coming, and it was about the same distance, to-wit, thirty to sixty feet from the point of the accident. No witness testified that the automobile was on the crossing sixty feet in front of the engine.

(2) On page 3 of the printed opinion of the court (R. 95) it is said:

> "but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train."

There is not a line of evidence that he stopped.

The plaintiff introduced one person, who claimed to be an eye-witness, a Mrs. Crystal Towne, who said she was about one hundred and fifty feet from the railroad track, and says that she saw the train strike the car (R. 62). This witness did not state, even by any inference, that the automobile stopped, or that she saw it, other than at the very moment of the collision.

The other eye-witnesses were Mrs. Mabel Seeley, who testified that he did not stop, but that he slackened his speed a little, and he then speeded up across the tracks (R. 71-72).

E. H. Baldwin testified, on direct examination, that he drove right in front of the train, and that as well as he can tell he did not slow up, or stop, from the time he first saw him. On cross-examination, he testified:

> "I know he slackened the speed of his car some, but not very much" (R. 78).

Ray Outman, a negro, and an eye-witness, testified that he saw the automobile before it got to the track, and that it did not stop or slacken its speed before it went upon the track (R. 79).

The fireman, A. R. White, testified that from the time he first saw the automobile until the time of the crash, it did not slow up, or stop, or change its speed any (R. 67-68).

Therefore, it cannot be said to be uncertain as to whether or not he stopped. The evidence is uncontradicted that he did not stop.

(3) On page 6, of the printed decision of the court (R. 97) it is said, in differentiating the case of Covington against the Seaboard Air Line Railroad, 99 Fla. 1105, 128 Sou. 426, that

> "It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing."

The plaintiff introduced one witness, as before stated, who saw only the actual impact, but the defendant introduced a witness, Mabel L. Seeley, who testified with respect thereto as follows:

> "There is a stop sign in the middle of Scotland Street to the west of the railroad track. * * * He did not stop. He slackened his pace a little bit."

She was then asked:

> "Q. State whether or not the driver of this automobile looked in the direction from which the train was coming, before he entered upon the tracks.
>
> A. Yes, it appeared to me that he did. He looked toward the train and then made a dash right across.
>
> Q. After he looked in the direction from which the train was approaching, what, if anything, did he do?
>
> A. He seemed to speed up to cross the tracks" (R. 71-72).

And this testimony was corroborated, in part at least, by the witnesses, White and Outman.

It is true, no witnesses testified in exact words that he was racing with the train, but every logical deduction to be gathered from this testimony is that he was so doing, because "he looked toward the train and then speeded up". Of course, he is charged with having seen what was there, and from the fact that he speeded up, it is clearly inferable that he saw the train and was, in fact, racing. Certainly the facts of racing with a train in this case more clearly appeared than in the Covington case.

At the close of all of the evidence in the case petitioner moved for a directed verdict in each case on the ground that there was no proof of negligence on the part of petitioner and no facts from which an inference of negligence could be drawn, showing or tending to show that any act of the petitioner contributed proximately to the accident and injury (R. 88). The district court granted petitioner's motion, using the following language:

> "Gentlemen, between the Supreme Court of the United States and the Circuit Court of Appeals and the Supreme Court of Florida, they have got the judge between the devil and the deep blue sea. The Supreme Court of the United States says that failure to stop, look and listen is negligence. In a case that went up from Ohio, they said that would defeat any recovery. Now the Circuit Court of Appeals, after that decision was rendered, have held that in Florida under this Apportionment statute that it would not necessarily defeat a recovery,

and I think that is the better rule where the evidence shows that the proximate cause of the injury was the negligence of the railroad and that failure to stop, look and listen was only contributory; but if the failure to stop, look and listen is the ultimate cause, then I am satisfied that there can be no recovery. The evidence is practically undisputed and overwhelming that this automobile did not stop. Whether the man looked and listened does not appear but if he did look he did not look to any purpose. There is some talk about the Ford rattling. The probabilities are that the Ford was rattling so that he could not hear anything; that is simply speculation. I cannot put my decision of that. So we come back to the question as to whether the railroad company was negligent.

The Supreme Court of the United States has held that a Georgia statute of which our Florida statute is an exact copy as far as I am advised —I never sat down and compared them—but the statute which casts the presumption of negligence on the railroad company, is unconstitutional and void in the Georgia case.

Now I understand that the Court of Appeals has upheld the Florida statute on account of the different construction given to the statute by the courts of Florida and the courts of Georgia. The courts in Georgia let the presumption go to the jury as evidence to be weighed in connection with the evidence given to rebut the presumption whereas the Florida court holds that it just merely shifts the burden and has no evidentiary effect at all. If the evidence is not produced to overcome the presumption the presumption stays there but where the evidence is

produced to overcome the presumption it loses all of its effect.

Now the Supreme Court has repeatedly held that the court must justify all of the evidence and when you take all of the evidence and consider it as a whole with all reasonable and logical deductions that can be drawn therefrom, a verdict of the jury could not be sustained, it is the duty of the court to direct a verdict.

Now the plaintiff proves enough here to cast the burden on the defendant, and the defendant produced evidence that the bell was rung and the whistle was blown and produced evidence as to a very reasonable rate of speed. Some of the plaintiff's witnesses swore that they heard a whistle. And all that you have to rebut that is the evidence offered by the plaintiff, the three witnesses who put this train running from about fifty and sixty miles an hour and one or two that did not hear the bell. Now that testimony that put it up around fifty or sixty miles an hour just shows that they did not know what they were talking about. If they had put it above thirty they would not know what they were talking about. They stretched it too much; they overreached themselves.

I am clearly of the opinion, taking the evidence as a whole, that the railroad company has carried the burden which is cast upon it to disprove the negligence. I am under my oath as judge to decide one way or the other as it appears to me. I cannot see that there is any negligence here upon the part of the railroad, and that it in any way contributed to this unfortunate accident, therefore you may prepare a verdict in each one of the cases.

Mr. Barton: I desire, of course, to make the same motion for each of the cases.

The Court: Yes.

Contributory negligence is not pleaded and could not be pleaded as to the children anyway. The court is of the opinion that the railroad company has overcome the presumption.

Exception was noted by the plaintiff to the ruling of the Court and to the peremptory instruction.

Thereupon, the jury returned into the court and the court instructed them as follows:

The Court: Gentlemen of the jury, I hope you have been having a better time than I have. You were relieved from listening to the argument for a while and I had to listen to it.

In this court the judge is required to assume some responsibility. He is not a mere referee of a fair fight to sit up here and let the jury pass upon the question and the court has decided that under all of the evidence here as a matter of law that neither of these plaintiffs could recover against the railroad company. This is an unfortunate accident, we all sympathize with the widow, but there are certain rules of law that control these matters and the court is responsible for the administration of these rules of law and you are not, consequently, I direct some one of your number to sign a verdict of not guilty in each one of these cases. That relieves you of all responsibility."

Rulings of the Court Below.

On appeal, as before stated, the Circuit Court of Appeals in the majority opinion affirmed the action

of the District Court in directing a verdict in cause No. 2733, being the action seeking damages for the death of the husband of plaintiff, but reversing and remanding causes Nos. 2730, 2731, 2732 and 2734, being those causes wherein the plaintiff sought a recovery for the death of her minor children in her personal right and as administratrix (R. 93 to 98).

Circuit Judge Hutcheson rendered a separate opinion in which he concurred in the reversal so far as the cases for the death of the children were concerned, but dissented from the opinion of the majority in the affirmance of the case seeking damages for the death of plaintiff's husband (R. 98 to 103).

Reasons Relied Upon for the Allowance of the Writ.

1. If the action and judgment of the District Court, affirmed by the Circuit Court of Appeals, was upon the ground that the sole proximate cause of the accident was the negligence of the driver of the vehicle, it follows as a matter of law that the District Court properly directed verdicts in each of the causes herein sought to be reviewed by certiorari and the judgments of the District Court should not have been reversed by the Circuit Court of Appeals.

2. Any other construction placed upon the opinion and judgment of the Circuit Court of Appeals in reversing the judgment of the District Court could only be based upon an entirely incorrect and erroneous finding of fact on most material matters.

3. The testimony on behalf of respondent upon which the Circuit Court of Appeals reversed the judg-

ment of the District Court is so uncertain, indefinite, conjectural, circumstantial and negative that it cannot under the Federal Rule raise a question of fact upon the material question in the case against the positive testimony of petitioner's witnesses, and, therefore, the Circuit Court of Appeals should not have reversed the judgment directed in favor of petitioner (*Southern Ry. Co.* v. *Walters,* 284 U. S. 190).

4. These three parties, for the death of whom respondent seeks damages, met death in the same accident and said causes were tried upon the same evidence, and, therefore, if the negligence of the father was the sole proximate cause of his death, it must likewise follow that his negligence was the sole proximate cause of the death of the children.

5. In holding that, under the circumstances set forth, the judicial discretion of the Trial Court was improperly exercised in directing a verdict for petitioner and in declining to recognize the superior opportunity of the Trial Court for reviewing the weight of the evidence, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure and by its decision sanctioned such departure in the future on the part of the Trial Courts in the Fifth Circuit as to call for an exercise of this Court's power of supervision (*Patton* v. *Tex. & P. R. Co.,* 179 U. S. 658).

WHEREFORE your petitioner respectfully prays that this petition in these consolidated cases for a writ of

certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit be granted.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation,
By McKINNEY BARTON,
Attorney,
St. Petersburg, Florida.

JAS. R. BUSSEY,
SAM H. MANN, JR.,
McKINNEY BARTON,
Solicitors,
St. Petersburg, Florida.

W. E. KAY,
General Solicitor,
Of Jacksonville, Florida.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 1000

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, PETITIONER,

vs.

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
AND AS ADMINISTRATRIX, ETC., RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Court Below.

There was no official written opinion by the District Judge. His action in directing a verdict is set forth in the record (R. 88-90).

The opinion of the Circuit Court of Appeals (R. 93-98) and the dissenting opinion (R. 98-103) rendered March 31, 1933, are not yet officially reported.

II.

Jurisdiction.

(1) The statutory provision believed to sustain the jurisdiction of this Court is Judicial Code, Section 240 (*a*), as amended by the Act of February 13, 1925, 43 Stautes, 938 (U. C. Code, Title 28, Sec. 347 (*a*)).

(2) The order of the Circuit Court of Appeals, review of which is sought, was entered on March 31, 1933 (R. 104).

Although the order of the Circuit Court of Appeals is not a final judgment, Section 240 (*a*) of the Judicial Code, as amended, clearly confers discretionary jurisdiction upon this Court to bring up a case of this character from the Circuit Court of Appeals by certiorari and sub-paragraph (*b*) of paragraph 5 of Rule 38 of this Court clearly recognizes such right. Certiorari was allowed by this Court after a judgment was reversed and a new trial ordered in the Circuit Court of Appeals *in Pennsylvania Railroad Company* vs. *Chamberlain,* — U. S. —, 77 Law Ed. 503, decided by this Court February 13th, 1933.

III.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari and in the inter-

ests of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

IV.

Specification of Errors.

It is respectfully submitted that the Circuit Court of Appeals erred in holding:

1. That the judgment of the District Court, entered on the directed verdicts for the defendant in causes, Nos. 2730, 2731, 2732 and 2734, should be reversed.

2. That although as a matter of law the sole proximate cause of an accident resulting in the death of three parties was the negligence of one of the parties, to-wit, the driver, yet as to the other two parties the question as to whether there was concurring negligence on the part of the defendant should be submitted to a jury.

3. That there was any evidence from which the jury might have reasonably concluded that the deaths of the children were caused by the combined or concurrent negligence of their father and the Railroad Company.

4. The Circuit Court of Appeals erred in its findings that the automobile was driven upon the crossing sixty feet in front of the engine, that the testimony as a whole leaves it uncertain whether the automobile was stopped or slackened speed when it arrived at the crossing, and whether the driver actually saw the train

and that it did not appear by the record that the driver was racing with the train in an attempt to pass ahead of it over the crossing.

5. That the superior opportunity of the trial judge for reviewing the weight of the evidence is not to be recognized in reviewing the case on appeal.

6. That the trial judge improperly exercised his judicial discretion in directing a verdict for the petitioner.

V.

ARGUMENT.

POINT I.

The Trial Court properly directed verdicts in each of these causes, because, as found by the District Court and concurred in by the Circuit Court of Appeals, the sole proximate cause of the accident resulting in the death of all the parties was the negligence of one of them, to-wit, the driver.

The Circuit Court of Appeals held, in so far as the case depended upon respondent's right to recover for the death of her husband, that it was not error to direct a verdict for the petitioner, and referring to Section 7052 Compiled General Laws of Florida for 1927, being the Statute establishing the Comparative Negligence Rule in the State of Florida, held that no recovery could be had on account of his death, citing the cases: *S. A. L. Ry.* v. *Tomberlin*, 70 Fla. 435, 70 Sou. 437; *Egley* v. *S. A. L. Ry.*, 84 Fla. 147, 93 Sou.

170; *A. C. L. R. R. Co:* v. *Gornto,* 89 Fla. 97, 103 Sou. 117; *F. E. C. Ry.* v. *Davis,* 96 Fla. 171, 117 Sou. 842; *Covington* v. *S. A. L. Ry. Co.,* 99 Fla. 1102, 128 Sou. 426; *Southern Ry. Co.* v. *Mann,* 91 Fla. 948, 108 Sou. 889, as authority for this position.

All these cases, so cited by the court as sustaining this view, are cases dealing with sole proximate cause and holding under facts very similar to the case at bar that the act of the plaintiffs in those various cases was the sole proximate cause. Yet, notwithstanding this finding by the court that as a matter of law the sole proximate cause of the accident was the negligence of the driver of the vehicle, yet, upon the same evidence found in the same record it concludes that so far as the deaths of the children were concerned, the causes should have been submitted to the jury, stating:

> "But the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company."

The Circuit Court of Appeals used the language:

> "The children were guilty of no negligence; and their father's negligence could not be imputed to them."

This is undoubtedly true, but we submit that the court has become confused on the question of "imputed negligence". This is evidenced by the citation of the case of *Little* v. *Hackett,* 116 U. S. 366, in which cause the doctrine of imputed negligence as to guests was repudiated.

Point II.

The Trial Court properly directed a verdict in each of these causes because the respondent failed to prove any act of negligence on the part of the defendant as the proximate cause of the accident; on the contrary, all of the evidence shows conclusively that the proximate cause thereof was the negligence of the driver of the vehicle.

In the dissenting opinion of Circuit Judge Hutcheson it is stated that the majority of the court held in their opinion that under the Florida Comparative Negligence Statute that a driver may be so contributory negligent as that though the recovery of those in the car with him will not be barred because his negligence is not the sole but a concurring proximate cause of the injury, his recovery will be barred.

It is respectfully submitted that the opinion of the majority of the Court does not bear this construction, and that such construction is contrary to all of the decisions of the Supreme Court of the State of Florida. The most recent case and most directly in point is the case of *Atlantic Coast Line R. R. Co.* v. *Watkins*, 121 Sou. 95, 97 Fla. 350.

Certainly under the law as it exists in the State of Florida under the Comparative Negligence Statute above referred to if the defendant was guilty of negligence proximately contributing to the accident and the plaintiff was, likewise, guilty of contributory negligence contributing to the accident, even though the plaintiff's negligence was far greater in degree than

that of the defendant, there could be a recovery, but the damages should be diminished in proportion thereto. Par. 7052, Compiled General Laws of Florida for 1927; *A. C. L. R. R. Co.* v. *Watkins*, 97 Fla. 350, 121 Sou. 95.

Assuming for the purpose of argument that the action of the majority of the Circuit Court of Appeals was based upon the construction placed thereon in the dissenting opinion of Circuit Judge Hutcheson, it is our belief that the Circuit Court of Appeals was lead into this error by a supposititious finding of facts not borne out by the record; that instead of the record showing that the automobile was driven upon the crossing sixty feet in front of the engine, as a matter of fact the record shows that when the engine was 30 to 60 feet from the crossing the automobile was at a like distance therefrom and going at approximately the same rate of speed. This is the uncontradicted evidence (R. 67-68).

That instead of the testimony leaving it uncertain whether the driver stopped or slackened his speed when he arrived at the crossing, the evidence is uncontradicted to the effect that he did not stop, but, on the contrary, he slackened his speed slightly and then speeded up to cross the tracks (R. 71-72).

That the finding in the opinion of the majority of the Court that it does not appear that the driver was racing with the train in an attempt to pass ahead of it over the crossing, is erroneous; the uncontradicted evidence is that after he looked in the direction from which the train was approaching, he then made a dash right across the track.

The Court of Appeals in attempting to differentiate the case of *Covington* v. *S. A. L. R. R. Co.*, 99 Fla. 1105, 128 Sou. 416, say that it is a somewhat similar case to the case at bar, but that the driver in that case could have seen the train at a distance of 75 feet from the crossing, whereas in this case the view was much more limited, and that it was fairly inferable from the pleadings in that case that the driver actually saw the train.

The opinion of the Supreme Court in that case, affirming the action of the Lower Court in directing a verdict, based its action upon the fact that the driver of the vehicle not only did not see the train but had not used any precaution to ascertain whether or not a train was coming.

We, therefore, say that an examination of the record requires the conclusion that the evidence on the issue as to the proximate cause of this accident is so conclusive as to justify a direction of a verdict by the Court (*Southern R. R. Co.* v. *Walters*, 284 U. S. 190).

POINT III.

The Circuit Court of Appeals erred in declining to give any weight to the superior opportunity of the trial judge of observing the witnesses and passing on the weight of the evidence.

Under the facts in these cases, when considered in connection with the well-established rule in the Federal court relative to the direction of a verdict, it seems inescapable that the direction of a verdict for petitioner by the District Court was proper. Under

the Federal rule a scintilla of evidence is not sufficient, but there must be reasonable and substantial evidence for the plaintiff before the case can be submitted to the jury and the evidence in favor of the plaintiff must be of such a conclusive and substantial character that if a verdict were rendered for the plaintiff, the Court would not have to set it aside in the exercise of sound judicial discretion. *Pleasants* v. *Fant*, 22 Wall. 116, 122; *St. L. & S. F. R. R. Co.* v. *Mills*, 271 U. S. 344; *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364, 369; *Herron* v. *Southern Pac. Co.*, 283 U. S. 91.

A scintilla or modicum of conflicting evidence irrespective of the character and measure of that to which it is opposed does not require the submission of the case to the jury. *Small Company* v. *Lamborn & Company*, 267 U. S. 248, 253, and the cases there cited.

In order legally to permit the submission of a case to the jury there must be reasonable evidence to show the breach of duty by the defendant. *Delaware, L. & W. R. Co.* v. *Koske*, 279 U. S. 7.

And the evidence for the plaintiff must be substantial evidence before the case can be submitted to the jury. *Atlantic Coast Line R. R. Co.* v. *Davis*, 279 U. S. 34.

The legal effect of the evidence is a question of law. *M. & R. V. Ry. Co.* v. *United States*, 270 U. S. 280, 285.

If petitioner is right in its contention that on the evidence in this case it was the right and duty of the District Court to direct a verdict in its favor, the error of the Circuit Court of Appeals in reversing the judgment may only be corrected by the allowance of this

writ and if not corrected the decision will have the effect of so limiting the powers of the District Courts in this circuit that petitioner and other railroads engaged in interstate transportation will be forced to submit the question of liability in personal injury cases to the decision of a jury in every case where there is the slightest evidence in favor of the plaintiff. This Court said in *Gunning* v. *Cooley*, 281 U. S. 90, 94:

> "Where the evidence upon an issue is all on one side or so overwhelmingly on one side as to leave no room for doubt as to what the fact is, the Court should give a peremptory instruction to the jury."

The importance of preserving the right of a district judge to take a case away from the jury if the evidence under the Federal rule does not warrant its submission cannot be overestimated and is a matter of the gravest public interest to litigants generally in this circuit. As was said by this Court in *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660:

> "At the same time, the judge is primarily responsible for the just outcome of a trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity as jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict

> save in the favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

In *Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458, this Court said (p. 459):

> "The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted."

We contend that the principle of these cases has not been applied by the Circuit Court of Appeals in this case.

Conclusion.

FOR THE REASONS STATED IN THE PETITION AND THIS BRIEF IT IS RESPECTFULLY SUBMITTED THAT THE APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Jas. R. Bussey,
Sam H. Mann, Jr.,
McKinney Barton,
Counsel for Petitioner,
St. Petersburg, Florida.

W. E. Kay,
General Solicitor,
Jacksonville, Florida.

INDEX.

Subject Index

	Page
Brief of petitioner on certiorari to the United States Circuit Court of Appeals for the Fifth Circuit	1
Material facts	2
Undisputed facts	2
Disputed facts	4
Speed	4
Warning signals	4
Vision	4
Action of lower courts	5
Action of this Court	5
Opinion of circuit court of appeals	5
Argument	6
Construction of opinion of circuit court of appeals	6
The applicable law	9
Conclusion	12

Cases Cited.

(A.)

Ætna Insurance Co. v. Boon, 95 U. S. 117, 24 Law Ed. 395	8
Atlantic Coast Line R. R. Co. v. Britton, — Fla. — (not yet officially reported), 146 Sou. 842	9
Atlantic Coast Line R. R. Co. v. Katherine H. Ford, 287 U. S. 502, 77 Law Ed. 355 (decided January 9, 1933)	9

(B.)

Baltimore & Ohio Railroad v. Tindall, 47 Fed. (2d) page 19	11

(C.)

Central of Georgia Ry Co. v. Faust, 17 Ala. A. 96, 82 Sou. 36 to 39	11
Chicago, Rock Island & Pac. R. R. Co. v. Houston, 95 U. S. 697, 24 Law Ed. 542	11
Cole v. German Savings & Loan Association, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416	8, 9

(D.)

Deweese v. Sovereign Camp, W. O. W., 110 Kan. 434, 204 Pac. 523 (See pages 526 to 527)	11

(F.)

Page

Florida East Coast Ry. Co. v. Davis, 96 Fla. 171, 117 Sou. 842..... 7

(M.)

Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 24 Law Ed. 256 8

(N.)

New York Central R. R. Co. v. Antonia Ambrose, as Administratrix, etc., 280 U. S. 486, 74 Law Ed. 562..... 11

(S.)

Seaboard Air Line R. R. Co. v. Watson, 103 Fla. 477, 137 Sou. 719.... 10
Seaboard Air Line R. R. Co. v. Watson, 287 U. S. 86, 77 Law Ed. 68 (Decided Nov. 7, 1932)..... 10
Small Co. v. Lamborn & Company, 267 U. S. 248, 69 Law Ed. 597.... 11

(W.)

Western & Atlantic R. R. Co. v. Henderson, 279 U. S. 639, 73 Law Ed. 884 10

STATUTES CITED.

Compiled General Laws of Florida, 1927, Section 7051..... 9
Section 7052..... 10

TEXT BOOKS CITED.

Ruling Case Law, Vol. 20, Par. 89, Pg. 104..... 8

APPENDICES.

Appendix "A" 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 95

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, PETITIONER,

vs.

SARAH ELIZABETH STRINGFELLOW, A WIDOW AND AS ADMINISTRATRIX, ETC., RESPONDENT.

BRIEF OF PETITIONER ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petition for certiorari filed by the Atlantic Coast Line Railroad Company herein, having been granted by this Court, your petitioner submits the following brief which it prays the Court may be allowed filed herein on the merits of the case.

These causes are now before this Court, as follows:

Sarah Elizabeth Stringfellow, a widow, suing the petitioner for the wrongful death of her minor daughter, Hazel Stringfellow.

Sarah Elizabeth Stringfellow, a widow, suing the petitioner for the wrongful death of her minor son, Jack Stringfellow.

Sarah Elizabeth Stringfellow, as administratrix of the estate of Hazel Stringfellow, suing the petitioner in her representative capacity.

Sarah Elizabeth Stringfellow, as administratrix of the estate of Jack Stringfellow, suing the petitioner in her representative capacity.

These causes were by order of the trial court consolidated and tried before the Honorable Alexander Akerman, District Judge, and a jury, and upon the evidence submitted by both parties resulted in a directed verdict for the defendant, petitioner here, in each of said causes (R., p. 88).

An appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit (R., p. 50), resulting in a reversal of these causes by that court, and a remand to the district court for a new trial (R., pp. 93 to 103). Certiorari has been granted herein.

Material Facts.

Undisputed Facts.

Guy Stringfellow, husband of plaintiff, and plaintiff's two children, Hazel Stringfellow, seven years of age, and Jack Stringfellow, nine years of age, met their death on March 9th, 1931, in a grade crossing accident in the incorporated town of Dunedin, Florida, the accident happening about 6:00 o'clock in the afternoon (R., pp. 54-55).

The defendant's tracks ran north and south at this point and Scotland Street, upon which the accident happened, runs east and west (R. 56). The Dunedin railroad station, one block north of the scene of the accident, was a flag stop for this particular train, but which on occasions, when not flagged, slowed up for the purpose of taking on mail (R., p. 85).

Guy Stringfellow, the driver of the automobile in which his two children were riding, lived in the town of Dunedin,

was familiar with the crossing and had crossed it frequently (R., pp. 74-75).

The automobile was traveling eastwardly upon Scotland Street and the train northwardly upon its right-of-way, crossing Scotland Street (R., p. 65).

After the collision with the vehicle, the train ran approximately 325 feet (R., p. 80).

There are cross-arms on Scotland Street approaching the crossing from either direction, marked "Railroad Crossing" (R., Photograph, pp. 92-131-A). There are three tracks at the intersection of this railroad and Scotland Street, the middle track being the main track, upon which the accident happened, the gauge being four feet four inches, and the distance from the west line of the main track to the west line of the house track is fifteen feet eight inches. A stop sign, protruding upward into the street a few inches, was to the right of the middle of Scotland Street, going east, approximately twenty feet from the west rail of the house or west track (R., p. 64).

Guy Stringfellow was driving his car eastwardly upon Scotland Street approaching the railroad crossing at a rate of speed of between ten or fifteen miles per hour (R., p. 68). He did not stop his automobile before entering the track (R., pp. 67-71-78-79-80).

He slowed up his automobile slightly, looked in the direction from which the train was coming and speeded up to cross the tracks, and was hit (R., p. 72).

At the time Mr. Stringfellow looked in the direction from which the train was coming, he had just passed the witness, Mrs. Seely, who at that time was on the north side of Scotland Street, walking easterly, toward the crossing (R., pp. 70-71).

At the time Mr. Stringfellow looked in the direction from which the train was approaching and then speeded up, Mrs. Seely was approximately ninety feet from the crossing,

on the north side of Scotland Street, and she looked and saw the train approaching (R., p. 72).

The best distance that a train of this character traveling over this crossing, going at the rate of twelve or fifteen miles an hour, could be stopped, in the opinion of an expert, is 250 to 350 feet; going at a rate of speed of 35 miles an hour, it could be stopped from 450 to 500 feet (R., p. 83).

The engineer, being on the right-hand side of the train, proceeding north, did not see the automobile until the happening of the accident (R. 65). The fireman, on the left-hand side of the engine, proceeding north, when within 30 to 40 feet of the crossing, saw the car approaching the crossing 30 or 40 feet therefrom, and called a warning to the engineer, who immediately applied the emergency brakes (R., pp. 67-68). From a point fifteen feet eight inches of the west rail of the main line the view south is absolutely unobstructed (R., p. 61).

Disputed Facts.

Speed.—As to the speed of the train, plaintiff's witnesses testified at a rate of speed of from 35 to 40 miles an hour (R., p. 57), and defendant's witnesses testified at a rate of speed of from 10 to 15 miles an hour (R., p. 68).

Warning Signals.—The plaintiff's witnesses, with one exception, testified that they heard no bell nor whistle (R., pp. 57-61-62). One of the plaintiff's witnesses testified that he heard a big whistle and one or two small whistles (R., p. 59).

All of the defendant's witnesses testified that the whistle blew a number of times and the bell was rung constantly by an automatic bell-ringer (R., pp. 65-67-69-75-78-79-80-81-85).

Vision.—One of plaintiff's witnesses testified that you could only see southwardly on Scotland Street when

you reached a point on the side track, which is shown to be fifteen feet eight inches from the main track (R., p. 61).

Another of plaintiff's witnesses testified that while standing at the stop signal on the west side of the track, before the bushes were cut, he could see down the railroad track sixty-five feet.

The defendant's witnesses testified that at the stop signal, which is shown to be a distance of thirty-five feet from the main track, you could see down the track 250 feet (R., p. 64).

Another witness testified that she was half way between the Smart home and the crossing, on the north side of the street, which is testified as being 180 feet from the crossing, therefore, making her 90 feet from the crossing—and she saw the approaching train at the time Mr. Stringfellow looked in the same direction and then speeded up (R., p. 72).

Action of Lower Courts.

It was upon these disputed and undisputed facts that the district court directed verdicts in each of the cases covered by this petition, which verdicts were rendered by the jury (R., pp. 45-46), and in each of the cases judgment for the defendant was entered thereon (R., pp. 46 to 49).

An appeal was taken by the plaintiff on the pauper's oath in each of the cases, and the causes heard in the circuit court of appeals, which reversed the action of the district court in directing a verdict in the causes covered by this petition (R., pp. 96-98).

Action of This Court.

The writ of certiorari has been granted by this Court.

Opinion of Circuit Court of Appeals.

The opinion of the circuit court of appeals, reversing this case, contains many erroneous statements of fact, here-

tofore pointed out in the petition for certiorari, and in view of that court's holding in the case of the driver of the vehicle, Guy Stringfellow, not involved herein, arives at an impossible conclusion of law. That conclusion of law being, in short, that while the sole proximate cause of the accident resulting in the death of all of the parties, was the negligence of one of them, to wit, the driver, and that therefore there can be no recovery for the death of the driver, yet there can be a recovery for the death of the children, whom me may term "guests". See Opinion, Court of Appeals, Record, pp. 93 to 98.

ARGUMENT.

Construction of Opinion of Circuit Court of Appeals.

This opinion deals with five causes of action, one for the death of Guy Stringfellow, the driver and plaintiff's husband, four for the deaths of the two children riding with him, and in rendering the opinion in these consolidated causes, the court first dealt with the action resulting in the death of plaintiff's husband, to wit, the driver, and held that no recovery could be had for his death because the accident was the result of his negligence, the sole proximate cause thereof. Yet, notwithstanding this holding, the court then proceeded to determine the correctness of the action of the district court with respect to the four cases involving the death of the children, and held that a jury case was presented.

In order that there may be no uncertainty as to what the court held, in so far as the driver of the car was concerned, we have attached as an appendix to this brief a copy of the opinion of the circuit court of appeals in dealing with the cause of action with respect to the driver of the vehicle, eliding therefrom only that portion of the opinion referring to other causes of action. The italics therein are ours.

It is true that in that part of the opinion dealing with the causes of action herein discussed, the circuit court of appeals, in its opinion, stated that:

> "The judgment is defended as to them only on the theory that the father's negligence was the sole proximate cause of their deaths. But the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company" (R., p. 96).

Again, to show that this was the holding of the circuit court of appeals, it will be seen that after holding as a matter of law there could be no recovery for the death of plaintiff's husband, the driver of the car, many Florida cases were cited as authorities for its so doing, and in each and every of the cases thus cited, the sole determinative question was whether or not the accident was brought about by the sole negligence of the plaintiff, and in not one of which was the question of concurring negligence involved.

It would seem, therefore, to be a reflection upon that court to assert that it would advance a proposition of law and cite authorities to sustain such a proposition, which authorities hold exactly contrary to the proposition it advanced.

In each of the cases thus cited, as above referred to, our so-called Comparative Negligence Statute was discussed, and in a number of which it was unequivocally stated that where there was concurring proximate negligence, there could be recovery, but the damages should be diminished. (See particularly *Florida East Coast Ry. Co.* v. *Davis*, 96 Fla. 171, 117 Sou. 842.)

The most plausible solution of the incongruous position taken by the circuit court of appeals is that they held that the driver of the car had the last clear chance to avoid the accident resulting in his death, and, therefore, his act

became the proximate cause of the accident and any negligence of the railroad became a remote cause, but that the negligence of the driver, not being imputable to the children, therefore the concurring proximate negligence of the driver with that of the remote negligence of the railroad company transformed the railroad's remote negligence into a proximate cause. This is not the law.

A clear statement of the law will be found in *R. C. L.*, Vol. 20, Par. 89, Pg. 104, wherein it is said:

> "Again, unless the ultimate injury is the natural and probable consequence of the defendant's act of negligence, that act is not the proximate cause of the injury, and no action can be maintained upon it, whether the succeeding injury results from that act alone or from that act and the concurring or succeeding negligence of a stranger. In other words, the concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that it is not actionable into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it, or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence."

After all, the so-called "last clear chance" doctrine is a method of determining the proximate cause, and whether it is called "last clear chance", "intervening cause", or "efficient cause" is immaterial.

Milwaukee & St. Paul Ry. Co. v. *Kellogg*, 94 U. S. 469, 24 Law Ed. 256;

Ætna Insurance Co. v. *Boon*, 95 U. S. 117, 24 Law Ed. 395.

Circuit Judge Sanborn, in the case of *Cole* v. *German Savings and Loan Association*, 124 Fed. 113, 59 C. C. A.

593, 63 L. R. A., page 416, discussed very learnedly the question of proximate cause and intervening causes, and made this pertinent observation:

> "It is now no longer difficult to determine whether or not the acts of the defendant were the proximate cause of the injury to the plaintiff. Wharton says: 'Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter (as to which I am not contractually bound). Another person, moving independently, comes in and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured.'"

So that we insist that if the circuit court of appeals were predicating their action in reversing the causes, involving the death of the minor children, on the theory that because the children were guilty of no negligence that the negligence of the railroad company, which was as to the driver a remote cause, was thereby transformed into a proximate cause, it is illogical and unsound and not supported by any authority.

The Applicable Law.

Section 7051, *C. G. L., Florida,* 1927, the so-called Presumption Statute, is procedural and the presumption of negligence of the defendant railroad company, which arises

thereunder upon proof of damage done by the running of a train, is at an end when the defendant adduces evidence tending to show that its employees had exercised all ordinary and reasonable care and diligence to avoid the collision,

The burden of proof is then upon the Plaintiff, and the Plaintiff may then recover only upon a showing by a preponderance of the evidence of the negligent injury that is duly alleged.

Atlantic Coast Line R. R. C. v. *Britton*, — Fla. — (not yet officially reported), 146 Sou. page 842.

Seaboard Air Line R. R. Co. v. *Watson*, 103 Fla. 477, 137 Sou. page 719.

Any other construction of this statute would bring it within the vice of the rule laid down in:

Western & Atlantic Railroad Co. v. *Henderson*, 279 U. S. 639, 73 Law Ed. 884.

Seaboard Air Line R. R. Co. v. *Watson*, 287 U. S. 86; 77 Law Ed. page 68 (decided Nov. 7, 1932).

Atlantic Coast Line R. R. Co. v. *Katherine H. Ford*, 287 U. S. 502, 77 Law Ed. 355 (decided Jan. 9, 1933).

Section 7052, *C. G. L., Florida*, 1927, the so-called Comparative Negligence Statute, is not involved herein. Plaintiff's children were guilty of no negligence. This is conceded.

The defendant, having adduced evidence tending to show that its employees had exercised all ordinary and reasonable care and diligence to avoid the collision, the burden of proof was on the plaintiff to show:

(*a*) Negligence on the part of the defendant.

Atlantic Coast Line R. R. Co. v. *Britton*, — Fla. — (see above), 146 Sou. 842.

(*b*) That such negligence was the proximate cause of the accident.

Chicago, Rock Island & Pacific R. R. Co. v. *Houston*, 95 U. S. 697, 24 Law Ed. 542.

Baltimore & Ohio Railroad Co. v. *Tindall*, 47 Fed. (2d), page 19.

New York Central Railroad Co. v. *Antonia Ambrose*, as administratrix, etc., 280 U. S. 486, 74 Law Ed. 562:

> "That one who discovers the imminent approach of a train moving at a dangerous rate of speed, and, measuring the distance to the crossing, attempts to beat the passage of the train and fails to his hurt, cannot recover for previous simple negligence of the railroad company."

Central of Georgia Ry. Co. v. *Faust*, 17 Ala. A. 96, 82 Sou. page 36-39.

> "When the evidence is undisputed or of such conclusive character that, if a verdict was returned for one party, it would have to be set aside, in the exercise of a sound judicial discretion, the court should direct a verdict for the other party."

Small Company v. *Lamborn & Co.*, 267 U. S. 248, 69 Law Ed. page 597.

A directed verdict was correctly given in these causes, because, in the words of the Supreme Court of Kansas:

> "Jurors are not permitted to set their eyes to what everybody else sees and understands and wander off into fields of imagination and suspicion in order to reach verdicts. Courts are more and more realizing and declaring that they must not permit themselves to be more ignorant than anybody else or fail to see what is plain to every one and everybody except a court."

Deweese v. *Sovereign Camp, W. O. W.*, 110 Kan. 434, 204 Pac. 523, see pages 526-527.

Conclusion.

It is perfectly apparent from this record that the defendant, having adduced proof of the exercise by its employees of due and reasonable care, that the plaintiff failed to meet the burden of proof thus cast upon it, to show that the accident was the result of the negligence of the defendant.

It is, likewise, apparent from this record that the driver of this vehicle looked and saw the approaching train, miscalculated his ability to cross safely, took a chance and lost, and that his act in so doing was the sole proximate cause of this accident.

It is respectfully submitted that the action of the circuit court of appeals in reversing and remanding these causes for a new trial was erroneous, and its action therein should be reversed, and the action of the lower court affirmed.

JAMES R. BUSSEY,
SAM H. MANN, JR.,
McKINNEY BARTON,
Attorneys for Petitioner,
St. Petersburg, Florida.

F. B. GRIER,
Advisory Counsel,
Greenwood, S. C.

W. E. KAY,
General Solicitor,
Jacksonville, Florida.

APPENDIX "A."

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 6617.

SARAH ELIZABETH STRINGFELLOW, *a Widow,*

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, *a Corporation.*

In Forma Pauperis.

Appeal from the District Court of the United States for the Southern District of Florida.

Before Bryan, Sibley, and Hutcheson, Circuit Judges.

OPINION—Filed March 31, 1933.

BRYAN, *Circuit Judge:*

Appellant, in her own right as widow * * * brought * * * actions * * * against the appellee railroad company for negligently running its train and fatally injuring her husband * * * at a street crossing in the town of Dunedin, Florida. Negligence was alleged (1) in failing to give warning of the approach of the train by sounding the whistle or ringing the bell of the engine, and (2) in running the train upon the street crossing at a dangerous rate of speed. Appellee pleaded not guilty and at the close of all the evidence the trial court directed a verdict in its favor upon the ground that the injuries complained of were caused solely by the negligence of appellant's husband. Appellant contends in support of her assignments that it was error to take the case away from the jury.

The accident, which resulted in the injuries alleged, occurred in the daytime at a grade crossing where Scotland

Street intersects the railroad right-of-way at right angles, the street extending east and west and the right-of-way north and south. On the right-of-way the main line was flanked on either side by a side track. To the south of the crossing the main line was straight for half a mile or more, but the view in that direction of one going east on the street was cut off by trees until the west side track, within 20 feet of the main line, was reached, at which point the view to the south was open and unobstructed. At the time of the accident appellant's husband was driving his automobile, in which his children, one seven, and the other nine years of age, were riding with him, toward the east across the intersection; and the train was coming from the south. The train was a few minutes late, and was not due to stop at Dunedin. A strong wind from the north-west interfered with the hearing of anyone at the crossing who might be listening for the rumble of the train, or for any warning that might have been given by whistle or bell. The evidence was in hopeless conflict as to whether the whistle was sounded or the bell was rung, and also as to the speed of the train. Several witnesses for appellant who were near the place of the accident and in position to hear testified that they heard no whistle or bell; and they gave various estimates of the rate of speed, ranging from 30 to 50 miles per hour. Two of these witnesses cited as evidence of their ability to estimate speed speedometer tests which they said they had made, while traveling by automobile on highways parallel with railroad tracks, of the speed of trains going in the same direction as they were. On the other hand witnesses for appellee, particularly the engineer, fireman and members of the train crew, testified that as the train approached Scotland Street the last of four blasts of the whistle was sounded, and that the bell was being rung by an automatic ringer from the time the train reached the fourth street south of Scotland Street until after the accident. Members of the train crew also testified that the train had slackened speed as it passed through Dunedin, and that it was running at a rate not exceeding 10 or 12 miles per hour as it approached Scotland Street. The fireman testified that he saw appellant's husband drive upon

the crossing about 60 feet in front of the engine, and that he called to the engineer who immediately put on the emergency brakes. The engineer testified that he did not see the automobile because it approached from the west and he was on the east side of the engine, but that he applied the emergency brakes as soon as the fireman called out to him and stopped the train as quickly as was possible. The engine proceeded about 100 yards north of Scotland Street before it was brought to a standstill. Several witnesses for appellee testified that appellant's husband drove across the intersection at a speed of 10 to 15 miles per hour; but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train.

Compiled General Laws of Florida provide:

"A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercises all ordinary and reasonable care and diligence, the presumption in all cases being against the company." Chap. 7051.

"No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." Chap. 7052.

It is plain that under Chapter 7051 a prima facie case was made out. *It is appellee's contention that the presumption of its negligence, which arose under that section, upon proof of the injuries as alleged, was overcome by further proof which disclosed that those injuries were caused solely by the negligence of the injured persons, and that*

the case presented is not one which calls for the application of the rule prescribed in Chapter 7052 for apportionment of damages, because no fault was attributable to it. Of course appellant could not recover for the death of any party who could not if living have recovered damages because of his injury. In so far as the case depends upon appellant's right to recover for the death of her husband, we are of the opinion that it was not error to direct a verdict for appellee. Her husband as driver of the automobile was under the duty of exercising the care and caution which a reasonably prudent man would have displayed under the same or similar circumstances. It therefore was his duty to use his senses of sight and hearing before undertaking to cross the railroad tracks. If when he had passed the trees and had an open view down the track he had looked he would have seen the train and could have avoided the collision. *A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching. train.* Notwithstanding Chapter 7052 he could not have recovered for an injury, and so recovery cannot be had on account of his death. *S. A. L. Ry.* v. *Tomberlin,* 70 Fla. 435; *Egley* v. *S. A. L. Ry.,* 84 Fla. 147; *A. C. L. R. R. Co.* v. *Gornto,* 89 Fla. 97; *F. E. C. Ry.* v. *Davis,* 96 Fla. 171; *Covington* v. *S. A. L. Ry.,* 99 Fla, 1102; *Southern Ry. Co.* v. *Mann;* — Fla. —, 108 Sou. 889.

NOTE.—(*a*) We have elided from the opinion that portion thereof relating to the alleged causes of action other than the one under discussion.

(*b*) Italicized portion ours.

FILE COPY

Office Supreme Court, U. S.
FILED
JUN 23 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 95

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION, PETITIONER,

v.

SARAH ELIZABETH STRINGFELLOW, A WIDOW, AND AS ADMINISTRATRIX, ETC., RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WM. C. MCLEAN,
Tampa, Florida,
DOYLE CAMPBELL,
Tampa, Florida,
Attorneys for Respondent.

INDEX.

Subject Index.

	Page
Brief:	
The opinion	1
Jurisdiction	1
Statement of the case	2
Statute involved	5
Argument	5
I. Point 1	6
II. Point 2	8
III. Point 3	10
Conclusion	12

Authorities Cited.

Charleston S. C. Mining & Mfg. Co. v. United States (1927), 273 U. S. 220, 47 S. Ct. 349, 71 L. Ed. 618	10
Chicago & N. W. R. R. Co. v. Osborne, 146 U. S. 354, 13 S. Ct. 281	5
Covington v. S. A. L. R. R. Co., 99 Fla. 1102, 128 So. 426	12
Delaware & Lackawanna Railroad v. Converse, 139 U. S. 469	12
Federal Trade Commission v. American Tobacco Co. (1927), 274 U. S. 543, 47 S. Ct. 663, 71 L. Ed. 1193	10
George A. Fuller Co. v. Otis Elevator Co., 245 U. S. 489, 38 S. Ct. 180	5
Railroad Company v. Stout, 17 Wall. 657	12
Richmond & Danville Railroad Co. v. Powers, 149 U. S. 43, 45	12
S. A. L. Ry. Co. v. Watson, 94 Fla. 571, 113 So. 716	7, 12
Southern Power Co. v. North Carolina Public Service Co. (1923), 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413	10
United States v. Johnston (1925), 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925	10
Washington & Georgetown Railroad v. McDade, 135 U. S. 554	12

Statutes Cited.

Compiled General Laws of Florida, 1927, Section 7052	5
United States, Section 240 (a) of the Judicial Code, 43 Stat. 938, 28 U. S. C. A. 347 (a)	1, 5

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 95

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION, PETITIONER,

v.

SARAH ELIZABETH STRINGFELLOW, A WIDOW, AND AS ADMINISTRATRIX, ETC., RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is reported in 64 Fed. (2d) 173 (R. 93-98).

Jurisdiction.

Petitioner seeks a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, under the provisions of Sec. 240 (*a*) of the judicial code, as amended by Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347 (*a*).

Respondent contends that inasmuch as the district court refused to allow the issues to be submitted to a jury and

directed a verdict for petitioner (R. 90) and entered judgment accordingly (R. 46-48), the action of the Circuit Court of Appeals in remanding the case to the district court "for further proceedings not inconsistent with the opinion" of the court (R. 104), which held the question of negligence "should have been submitted to the jury" (R. 96), does not present such a case as to call for review by this Court. Neither the petition nor brief show any reason why a review on certiorari should be granted to review a judgment which is not final.

Statement of the Case.

Petitioner in its statement, pages 6 to 12, has given some excerpts from the record, and disputes with the Circuit Court of Appeals upon its determination as to the facts, and since it appears to respondent that the petition does not give "A concise statement of the case containing all that is material to the consideration of the question presented, with appropriate page references to the printed record," the respondent takes the liberty of submitting a narration of the facts, which she deems essential to a ready and adequate understanding of the points sought to be brought before the Court.

Respondent in her own right as widow and as administratrix, on May 25, 1931, brought five separate actions in the District Court of the United States for the Southern District of Florida, Tampa Division (R. 28, 11, 19, 2, 36), against the petitioner for negligently running its train upon and fatally injuring her husband and two minor children at a street crossing in the City of Dunedin, Florida. A satisfactory statement of facts is found in the opinion of the Circuit Court of Appeals (R. 93-95), which we quote, but to which we have added in parentheses the record page references of the facts thus recited:

"The accident, which resulted in the injuries alleged, occurred in the daytime at a grade crossing where Scotland Street intersects the railroad right-of-way at right angles, the street extending east and west and the right-of-way north and south (R. 56). On the right-of-way the main line was flanked on either side by a sidetrack (R. 63). To the south of the crossing the main line was straight for a mile or more, but the view in that direction of one going east on the street was cut off by trees until the west sidetrack, within 20 feet of the main line, was reached, at which point the view to the south was open and unobstructed (R. 61, 86, and photographs). At the time of the accident appellant's husband was driving his automobile, in which his children, one seven and the other nine years of age, were riding with him, toward the east across the intersection; and the train was coming from the south. The train was a few minutes late (R. 60, 67), and was not due to stop at Dunedin (R. 85). A strong wind from the northwest interfered with the hearing of anyone at the crossing who might be listening for the rumble of the train, or for any warning that might have been given by whistle or bell (R. 60, 74). The evidence was in hopeless conflict as to whether the whistle was sounded or the bell was rung, and also as to the speed of the train. Several witnesses for appellant who were near the place of the accident and in position to hear testified that they heard no whistle or bell; and they gave various estimates of the rate of speed, ranging from 30 to 50 miles per hour (R. 57, 59, 60, 61, 63, 88). Two of these witnesses cited as evidence of their ability to estimate speed speedometer tests which they had made, while travelling by automobile on highways parallel with railroad tracks, of the speed of trains going in the same direction as they were (R. 56, 59). On the other hand, witnesses for appellee, particularly the engineer (R. 65), fireman (R. 68) and members of the train crew (R. 82, 85), testified that as the train approached Scotland Street the last of four blasts of the whistle was sounded, and

that the bell was being rung by an automatic bell ringer from the time the train reached the fourth street south of Scotland Street until after the accident. Members of the train crew also testified that the train had slackened speed as it passed through Dunedin, and that it was running at a rate not exceeding 10 or 12 miles per hour as it approached Scotland Street. The fireman (R. 68) testified that he saw appellant's husband drive upon the crossing about 60 feet in front of the engine, and that he called to the engineer who immediately put on the emergency brakes as soon as the fireman called out to him and stopped the train as quickly as possible. The engine proceeded about 100 yards north of Scotland Street before it was brought to a standstill (R. 62). Several witnesses for appellee testified that appellant's husband drove across the intersection at a speed of 10 or 15 miles per hour (R. 68, 80); but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train."

By direction of the district judge the cases were consolidated for trial (R. 54).

Negligence of the railroad company was alleged in failing to give warning of the approach of the train by sounding the whistle or ringing the bell of the engine and in running the train upon the street crossing at a dangerous rate of speed (R. 2, 11, 19, 28, 36). The railroad company pleaded not guilty (R. 10, 19, 27, 35, 44).

In each case separate verdicts (R. 45, 46) and judgments were entered (R. 46, 48) and separate appeals were taken (R. 51) but on a single transcript and were docketed in the Circuit Court of Appeals as one case, argued as one case and were disposed of by a single written opinion. The judgments appealed from were reversed on March 31, 1933, as to all actions, *except* the one brought by respondent in her own right as widow for the death of her husband (R. 104), which was affirmed, in which case the Circuit Court

of Appeals entered an order granting respondent's motion for a *Severance* (R. 115) from all of her co-appellants for the purpose of filing a petition in this Court for a writ of certiorari.

Statute Inolved.

The statute of the State of Florida, which petitioner refers to on page 8 of its petition as No. 7052, Compiled General Laws of Florida, 1927, is as follows:

> "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him."

ARGUMENT.

The respondent first insists that the petition does not present such a case as to call for a review under Sec. 240(*a*) of the judicial code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Sec. 347(*a*), which provides for a writ of certiorari and "*that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.*"

So far as respondent is advised, the court has not yet construed this section to authorize a writ of certiorari to review a judgment not final, although prior to the amendment, it was well settled that a judgment not final was insufficient to invoke the jurisdiction of the court.

George A. Fuller Co. v. *Otis Elevator Co.*, 245 U. S. 489, 38 Sup. Ct. Rep. 180.

Chicago & N. W. R. Co. v. *Osborne*, 146 U. S. 354, 13 Sup. Ct. Rep. 281.

Neither the petition nor the brief show any reason why a review on certiorari should be granted to review a judgment not final.

Neither does it appear that there are special and important reasons therefor, nor does the existence of any reasons for a review under rule 38, paragraph 5, appear in the petition or brief.

Questions Presented.

Point I.

"THE TRIAL COURT PROPERLY DIRECTED VERDICTS IN EACH OF THESE CASES, BECAUSE, AS FOUND BY THE DISTRICT COURT AND CONCURRED IN BY THE CIRCUIT COURT OF APPEALS, THE SOLE PROXIMATE CAUSE OF THE ACCIDENT RESULTING IN THE DEATH OF ALL THE PARTIES WAS THE NEGLIGENCE OF ONE OF THEM, TO WIT, THE DRIVER." (Petitioner's brief, page 22.)

Respondent is unable to find in the opinion of the circuit court any warrant for the question here presented, that the father's negligence was the sole proximate cause of the accident; but on the other hand, the court very clearly held that the evidence did not establish as a matter of law, that the father's negligence was the sole proximate cause of their (the children's) death (R. 96).

The circuit court held (R. 96):

> "There was substantial evidence, tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run the train through a populous community without warning, or at a speed so great that it could

not be stopped within less than 100 yards; especially if because of a strong headwind it was made difficult for those using the street intersection to hear a train approaching from the south."

In other words, the court held (R. 96):

"the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company";

and held further, that the evidence did not establish as a matter of law, that

"the father's negligence was the sole proximate cause of their deaths" (R. 96).

The court held further that

"The children were guilty of no negligence; and their father's negligence could not be imputed to them" (R. 96).

That

"it was open for the jury to find that appellant's husband did not know or realize that a train was approaching. It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing" (R. 97).

And further cited with approval, the rule laid down by the Supreme Court of Florida in *S. A. L. Ry. Co.* v. *Watson*, 94 Fla. 571, 113 So. 716:

"There may be concurrent causes of a single injury —concurrent negligence of two separate and distinct agencies—which, operating contemporaneously, together constituted the efficient proximate cause of the injury inflicted, and without either one of which the harm would not have been done" (R. 97).

And the court concluded (R. 98):

> "Our conclusion is that the jury would have been warranted by the evidence in finding that appellee was liable in damages to appellant for the deaths of her children."

At most, petitioner presents under this subject, controverted facts, which have been directed by the Circuit Court of Appeals to be submitted to a jury for final determination. No jury has ever passed upon the facts and the judgment sought to be reviewed, merely sends the case back for submission to a jury upon evidence which the Circuit Court of Appeals found to be

> "in hopeless conflict as to whether the whistle was sounded or the bell was rung, and also as to the speed of the train" (R. 94).

Respondent submits that in a case where the evidence is conflicting on the question of negligence *vel non*, the remanding of the issues to a jury, does not present such a case as to call for a review by this Court on certiorari. Neither does it appear that the decision sought to be reviewed will have any bearing on any other case that might arise.

Point II.

> "THE TRIAL COURT PROPERLY DIRECTED A VERDICT IN EACH OF THESE CAUSES BECAUSE THE RESPONDENT FAILED TO PROVE ANY ACT OF NEGLIGENCE ON THE PART OF THE DEFENDANT AS THE PROXIMATE CAUSE OF THE ACCIDENT; ON THE CONTRARY, ALL OF THE EVIDENCE SHOWS CONCLUSIVELY THAT THE PROXIMATE CAUSE THEREOF WAS THE NEGLIGENCE OF THE DRIVER OF THE VEHICLE." (Petitioner's brief, page 24.)

Under this subject the Petitioner takes issue with the finding of facts by the Circuit Court of Appeals, and says:

> "the Circuit Court of Appeals was led into this error by a supposititious finding of facts not borne out by the record" (Brief p. 25).

Without going into a discussion of facts, we direct the court's attention to the fact that the Circuit Court of Appeals (R. 96) held:

> "The jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company."

Respondent submits that the question of *proximate cause* is primarily a question of fact; and upon an appeal from a directed verdict, the evidence must be given all reasonable inferences to be deducted therefrom in the light most favorable to respondent.

The record and the opinion of the Circuit Court of Appeals disclose that respondent introduced evidence, which, if believed by the jury to be true, would have established negligence upon the part of petitioner. The court said (R. 98):

> "Our conclusion is that the jury would have been warranted by the evidence in finding that appellee was liable in damages to appellant for the death of her children."

Respondent contends that this assignment only presents the question of whether the evidence introduced upon the trial was sufficient to establish negligence on the part of Petitioner; *primarily a question of fact.* Respondent also respectfully submits that a petition for a writ of certiorari, for the reason cited under this assignment, is contrary to the well established rule of this Court. That the Court will not consider questions of fact on certiorari has been frequently stated:

Southern Power Co. v. *North Carolina Public Service Co.*, (1923), 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413;
United States v. *Johnston*, (1925) 288 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925;
Federal Trade Commission v. *American Tobacco Co.*, (1927) 274 U. S. 543, 47 S. Ct. 663, 71 L. Ed. 1193;
Charleston S. C. Mining & Mfg. Co. v. *United States*, (1927) 273 U. S. 220, 47 S. Ct. 349, 71 L. Ed. 618, and cases cited therein.

Neither does the Petition disclose that the controverted question is of general importance.

POINT III.

"THE CIRCUIT COURT OF APPEALS ERRED IN DECLINING TO GIVE ANY WEIGHT TO THE SUPERIOR OPPORTUNITY OF THE TRIAL JUDGE OF OBSERVING THE WITNESS, AND PASSING ON THE WEIGHT OF THE EVIDENCE." (Petitioner's Brief, page 26).

(Petitioner's Assignment of Error No. 5 (Page 22):

"That the superior opportunity of the trial judge for reviewing the weight of the evidence is not to be recognized in reviewing the case on appeal"

does not appear in the decision of the Circuit Court of Appeals, either expressly or by implication (R. 93 to 98). Neither does it appear that the Circuit Court of Appeals *declined* to give any weight to the opportunity of the trial judge in observing the witnesses and the weight of the evidence.

Manifestly, upon an appeal from a directed verdict, the Circuit Court of Appeals must suppose itself in the same position as the trial judge when it passes upon his ruling. Unless this be so it must abdicate any review, except in

cases where the bare print leaves no doubt. The question before the Circuit Court of Appeals is the same as was before him; anything else makes his the final word.

Upon the trial of this case Respondent introduced evidence which, if believed by the jury, was sufficient to establish negligenec upon the part of the Petitioner:—The train was running late (R. 60); one block from where the accident occurred it was travelling between 40 and 50 miles an hour (R. 57); the bell was not ringing and the whistle was not blowing (R. 57, 59); the speed of the engine when it reached Scotland Street, according to one witness, was 35 to 40 miles an hour (R. 57); and two other witnesses placed the speed between 40 to 50 miles an hour (R. 59-60, 87-88). In addition to this it was established by uncontroverted testimony that the accident happened on one of the main thoroughfares of the City of Dunedin, at a populous section of the city, and that Scotland Street crossing was one that is constantly and habitually used by pedestrians and those travelling in conveyances of all kinds in crossing and recrossing the railroad tracks. That in approaching the railroad tracks in an easterly direction along Scotland Street, intervening objects prevent the view of an approaching train from the south until a person is "on the sidetrack" (R. 61, 86).

Respondent recognizes the right of the trial court to grant a new trial where he is of the opinion that the verdict is against the overwhelming weight or clearly against the great preponderance of the evidence, but the trial court cannot, for the same reason, direct a verdict for the defendant and thereby infringe upon the right of the plaintiff to have the case submitted to a jury.

If, as said by the Circuit Court of Appeals (R. 96), the injury and death of the children was "caused by the combined or concurrent negligence" of the Petitioner and the

father, the driver of the car (R. 96), then the Respondent was entitled to recover against the Petitioner although the father's negligence, concurring with that of the Petitioner, was the proximate cause of the injury. This is the well settled rule in Florida:

S. A. L. R. R. Co. v. *Watson,* 94 Fla. 571, 113 So. 716; *Covington* v. *S. A. L. R. R. Co.,* 99 Fla. 1102, 128 So. 426.

Conflict in the testimony as to the speed of the train and the failure to give warning of its approach should have been submitted to the jury. It was purely a question of fact to be determined by a jury and not by the trial court in peremptorily directing a verdict for Petitioner.

The trial court assumed the providence of the jury to pass upon conflicting testimony and the credibility of the witnesses (R. 90).

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions from them. *Railroad Company* v. *Stout,* 17 Wall. 657; *Washington & Georgetown Railroad* v. *McDade,* 135 U. S. 554; *Delaware & Lackawanna Railroad* v. *Converse,* 139 U. S. 469."
>
> *Richmond & Danville Railroad Co.* v. *Powers,* 149 U. S. 43, 45.

Conclusion.

The Respondent respectfully submits that the decision of the Circuit Court of Appeals is in accordance not only with local and federal law, but is a judgment not final, and the Petition shows no reason nor the importance of why an

immediate necessity for review by this Court should be granted.

Wherefore Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SARAH ELIZABETH STRINGFELLOW,
A Widow and as Administratrix, etc.,
By WM. C. MCLEAN,
By DOYLE CAMPBELL,
Attorneys for Respondent.

INDEX

Subject Index.

	Page
Material facts	2
Undisputed facts	2
Disputed facts	2
Speed	2
Warning signals	3
Vision	3
Argument	3
The applicable law	5
Conclusion	10

Cases Cited.

Anderson v. Crawford et al., — Fla. —, 149 So. 656 (Adv. Sheet No. 10, published October 19, 1933)	7
Claughton v. A. C. L. R. R. Co., 47 Fed. (2) 679, 680	11
Covington v. S. A. L. Ry. Co., 99 Fla. 1102, 128 So. 426	3
Fla. Cent. & P. R. Co. v. Foxworth, 41 Fla. 1, 25 So. 338	9
Little v. Hackett, 116 U. S. 366, 6 S. Ct. 391	3
Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 884	6
S. A. L. Ry. Co. v. Thompson, 57 Fla. 155, 48 So. 750	6
S. A. L. Ry. Co. v. Watson, 103 Fla. 477, 137 So. 719, 287 U. S. 86, 77 L. Ed. 68	3, 5, 6
Slocum v. N. Y. Life Ins. Co., 228 U. S. 364	7
Walker v. New Mexico R. Co., 165 U. S. 593, 596, 17 S. Ct. 421, 41 L. Ed. 837	7
Weinstein v. Powell, 61 Fed. (2) 411	10
Western & Atlantic R. Co. v. Henderson, 279 U. S. 639, 49 S. Ct. 455, 73 L. Ed. 884	6

Statutes Cited.

Compiled General Laws of Florida, 1927, Sec. 7051	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 95

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, PETITIONER,

vs.

SARAH ELIZABETH STRINGFELLOW, A WIDOW AND AS ADMINISTRATRIX, ETC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT.

This case is the companion case with Sarah Elizabeth Stringfellow, a Widow, Petitioner, versus Atlantic Coast Line Railroad Company, a Corporation, Respondent, No. 71, and as we understand it will be heard on the same record and at the same time. Therefore what we have had to say in our Brief on the Merits in Case No. 71 will be equally applicable here, both as to Statement of the Case and Argument, except that we deem that the following statement of the case should be made in correcting what we consider certain inaccuracies in the Statement by Petitioner in its Brief under the heading:

Material Facts.

Undisputed Facts.

The Undisputed Facts set out in Petitioner's Brief are correct except it is uncertain whether Stringfellow stopped or slackened up before attempting to cross the track (R. 73, 74, 86, 87), and it is certain that he "looked south, then north:" (R. 73), and that when he first saw the train he was on the tracks (R. 79). It is uncertain where the witness, Mrs. Sealy, was standing, because on R. 72 she says she was 90 feet from the crossing on the north side of Scotland Street, and on R. 74, on cross-examination, she does not deny that she was "waiting at the *crossing* for the train to pass," and on R. 73, on cross-examination, she does not deny saying to the witness, Mrs. Smart, about 10 or 15 minutes after the accident: "I thought Mr. Stringfellow saw the train, he drove up pretty close to the tracks and almost stopped, looked south and then north and then speeded ahead to cross. I thought Mr. Stringfellow saw the train, but undoubtedly he did not." In addition to these inconsistencies in her testimony, her testimony was impeached by two witnesses (R. 86, 87). It is also certain that the train was not scheduled to stop at Dunedin on the afternoon of the accident (R. 85), and was running late (R. 60, 67), in the teeth of a strong wind which interfered with a person using the street intersection in hearing the noise of an approaching train or any warning signals of its approach (R. 60, 74).

Disputed Facts.

Speed:

The statement in Petitioner's Brief is correct as to conflicts in the testimony as to speed of the train except that respondent's witnesses testified to a speed from 35 to 50

miles an hour, of the train at the point of the accident (R. 56, 57, 59, 87).

Warning Signals:

Only one of respondent's witnesses testified to hearing a whistle blow and the whistle heard at that time was:

> "the big whistle when it blew at Sunset Point, a mile or mile and a half from town. • • • I heard the smaller whistle two or three times after the big whistle. When the air whistle blew, the train was this side of the Water Tank. South of Albert Street, two or three streets cross the railroad. Between Albert Street and where the wreck took place on Scotland Street, I did not hear any whistle blow or bell ring" (R. 59).

Vision:

Conflict in the testimony as to vision is correctly stated by petitioner, except there was no conflict that at 15 feet, 8 inches, from the main line the view to the south was open and unobstructed.

ARGUMENT.

Petitioner takes the position that under the opinion of the circuit court of appeals, the court held that the father's negligence was the sole proximate cause of the injury of himself and children. On the contrary, the opinion of the court below will justify no such conclusion. The court did hold that the father and the railroad company were concurrently negligent and that the father's negligence could not be imputed to his children unless his negligence was the *sole* proximate cause of their deaths. *S. A. L. Ry. Co.* v. *Watson*, 94 Fla. 571, 113 So. 716; *Covington* v. *S. A. L. Ry. Co.*, 99 Fla. 1102, 128 So. 426; *Little v. Hackett*, 116 U. S. 366, 6 S. Ct. 391. It is upon this conclusion or holding of "*combined or concurrent negligence of their father and*

the railroad company" (R. 96) that petitioner in case No. 71 submits that the court erred in not remanding case No. 71 to the district court for a trial before a jury upon the conflicting evidence, along with the cases involved in this Petition, No. 95. That there was evidence sufficient for the jury to reasonably have concluded that some appreciable negligence of the railroad company proximately contributed to the injury and death of respondent's husband and children is set out in our brief in case No. 71. What the circuit court of appeals did hold was (R. 96):

> "There was substantial evidence, tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run a train through a populous community without warning, or at a speed so great it could not be stopped within less than 100 yards; especially if because of a strong head wind it was made difficult for those using the street intersection to hear a train approaching from the south."

There can be no doubt from the court's language: (R. 96)

> "the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company;"

Certainly it cannot be said from this statement that the court held that the father was solely responsible or solely negligent. And on R. 97 the court said:

> "it was open for the jury to find that appellant's husband did not know or realize that a train was approaching. It does not appear in this case that the driver was

racing with the train in an attempt to pass ahead of it over the crossing."

It would seem that the case of *S. A. L. Ry. Co.* v. *Watson*, 94 Fla. 571, 113 So. 716, cited by the court to sustain its view, conclusively establishes the findings of the court that both the father and the railroad company were negligent. The opinion quotes from the Watson case: (R. 97)

> "There may be concurrent causes of a single injury —concurrent negligence of two separate and distinct agencies—which, operating contemporaneously, together constitute the efficient proximate cause of the injury inflicted, and without either one of which the harm would not have been done."

And on R. 98:

> "Our conclusion is that the jury would have been warranted by the evidence in finding that appellee was liable in damages to appellant for the deaths of her children."

It necessarily follows from these findings and the conflict in the evidence, that the circuit court of appeals was completely justified and correct in remanding the cases involved in this petition to the district court for submission to a jury upon the issues of fact.

The Applicable Law.

Under this heading petitioner in its brief implies that respondent upon the trial of this case relied upon a presumption of negligence cast upon the railroad company by mere proof of the injuries alleged. It does not appear from the record in this case that the respondent upon the trial relied upon any presumption of negligence cast upon the railroad company by Section 7051, C. G. L. of Florida, 1927, in proving her case, and consequently the authorities cited

under this section of petitioner's brief are not applicable. There is no dispute as to the effect of this statute. Whatever presumption there was, was at an end upon the defendant railroad company introducing any evidence tending to show that its agents and employees had "exercised all ordinary and reasonable care and diligence" (Section 7051, *supra*).

Seaboard Air Line Ry. Co. v. *Thompson*, 57 Fla. 155, 48 So. 750;

Seaboard Air Line Ry. Co. v. *Watson*, 103 Fla. 477, 137 So. 719, 723, 287 U. S. 86, 77 L. Ed. 68;

Mobile, J. & K. C. R. Co. v. *Turnipseed*, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78;

Western & Atlantic R. Co. v. *Henderson*, 279 U. S. 639, 49 S. Ct. 455, 73 L. Ed. 884.

Independent of the presumption, the respondent introduced evidence upon her case in chief which was sufficient to establish negligence upon the part of petitioner and that such negligence was the proximate cause of the injury. Otherwise credence must only be given to the testimony of the petitioner, and that of respondent ignored; which was exactly what the trial court did and for which reason the circuit court of appeals reversed this case (R. 96-98). The "so-called presumption statute" is not involved in this case, insofar as the "presumption" is concerned. What is involved, *is whether the trial court in the light of the Florida decisions and in spite of the conflict in the evidence, had the right to disregard the Florida decisions and disregard respondent's right to a trial by jury and decide the case himself, upon evidence which the circuit court of appeals found to be "in hopeless conflict"* (R. 94), and which the circuit court of appeals very properly held was a question *"for the jury, not the court"* (R. 96).

Was the circuit court of appeals correct in sending this case back to be submitted to a jury?

It is submitted that the state of the evidence required that the issues of fact raised upon conflicting testimony "shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative."

Walker v. *New Mexico R. Co.*, 165 U. S. 593, 596, 17 S. Ct. 421, 41 L. Ed. 837.

It was said by this Court in *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364, that in no instance may the judge find the facts for the jury, and that while he may set the verdict aside, if he does so another trial by jury must follow. In that case the court said:

> "It is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence; and that while it is the duty, even to the extent of directing their verdict when the insufficiency or conclusive character of the evidence warrants such a discretion, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact."

In our brief in case No. 71, we have pointed out that under the Florida decisions, the jury might, from the evidence introduced, reasonably have concluded that some appreciable negligence of the railroad company proximately contributed to the death of respondent's husband and children. There has just been published another decision by the Florida Supreme Court in which it was held that the mere fact that the driver of the automobile did not stop or take such precautions for his safety as are reasonably required under the circumstances would not bar a recovery where it also appears from the evidence that the railroad company was also negligent. This was the case of *Anderson* v.

Crawford, et al., 149 So. 656 (Advance Sheet No. 10, published October 19, 1933), wherein the court said:

> "While it is true that the plaintiff may not recover from a railroad corporation damages for personal injuries sustained while attempting to cross the track of the railroad at a public crossing in front of an approaching train when he knew, or could have known by the exercise of reasonable caution, of the approach of the train and the imminent danger to which he voluntarily subjects himself by attempting to cross the track in front of it, yet, if the plaintiff's negligence was not the sole proximate cause of the injury, or if the evidence is not so clear as to be apparent that he was the sole cause of his own injury, but only amounted to contributory negligence, and the injury might have been avoided but for the negligence of the railroad corporation, he may nevertheless recover damages for his injury, but they will be reduced in proportion to the contributory negligence of the injured party. (4) We reiterate what this court has often said relating to the reciprocal duties of railroad train operatives and a person travelling upon the public highway who desires to cross a railroad track. The conditions existing at the crossing at the time of the accident constitute the measure of duty resting upon the train operatives on the one hand and the traveller upon the public highway on the other. * * * The speed at which the train was operated is one circumstance; that such speed was in excess of the limitations placed by a valid ordinance upon the speed at which trains should be operated at certain places was another circumstance tending to show the carelessness and disregard of life on the part of the train operatives in handling the train. While it is true that, if the plaintiff saw the approaching train, or by the exercise of due care could have seen it as it approached, but in careless disregard of his own life drove his automobile upon the track in front of the train, he should not be allowed to recover damages for injuries sustained, yet that was a matter

to be determined by the jury, and the circumstances of this case as they existed at the crossing at the time of the accident are not so perfectly and convincingly evident of plaintiff's carelessness and disregard of his own welfare as to have warranted the court in taking the question from the jury and deciding that the defendant was free from any liability."

It is true that it does not appear from the record in this case that there was a valid ordinance in the City of Dunedin limiting the speed of trains at the point where the accident occurred, yet the Florida Supreme Court in the *Foxworth* case, which has been affirmed time and time again, laid down the rule:

> "A railroad company operating its trains along or across the streets of a town or city, must use greater care than in less frequented localities, and any neglect of any precaution proper in the peculiar circumstances of the locality constitutes negligence."
>
> *Fla. Cent. & P. R. Co.* v. *Foxworth*, 41 Fla. 1, 25 So. 338.

If *any* neglect of *any* precaution proper in the peculiar circumstances of the locality constitutes negligence, and viewing conflicts in the evidence in the light most favorable to respondent and accepting as established all the essential facts which respondent's evidence, if not contradicted, would fairly prove to be true, we must come quickly to the conclusion that the engineer did not signal with whistle or bell and was running the train at a high and dangerous rate of speed through a thickly settled community, over a much-travelled street where the view was obstructed and in the face of a strong head wind which obstructed the sound of an approaching train from the south, thereby showing or tending to show a carelessness and disregard of life on the part of the train operatives in handling the train. Consequently the railroad company was palpably

negligent, and that such negligence was *a* proximate cause of the collision cannot be doubted. We therefore submit that it might well be said on this record that negligence of respondent's husband, operating contemporaneously with that of petitioner, *together* constitute the efficient proximate cause of the injuries inflicted, without either one of which the harm would not have been done. While a person about to cross a railroad track must use *reasonable* caution, he is not required to be *infallible—only careful.*

> "While the *Goodman* case extends the doctrine of contributory negligence, as applied to crossing accidents, to an extreme limit, it does not go to the extent of holding that there can be no recovery in any case where the injured party does not stop to look and listen for an approaching train before going upon the track."
>
> *Weinstein* v. *Powell,* 61 Fed. (2) 411.

Conclusion.

In conclusion, respondent submits a quotation from the *Claughton* case, referred to by Mr. Justice Hutcheson in his separate dissenting opinion (R. 98), as correctly announcing and applying the rule applicable to both this case and case No. 71:

> "Under the second above set out statute, the burden of proving the alleged injury or death is on the plaintiff, and the burden of showing the absence of negligence is on the defendant. Under the last above set out provision, if the deceased and the agents of the defendant were both at fault, the plaintiff was entitled to recover, but the amount of damages is required to be diminished in proportion to the contributory negligence of the deceased. *Atlantic Coast Line R. Co.* v. *Weir,* 63 Fla. 69, 58 So. 641, 41 L. R. A. (NS) 307, Ann. Cas. 1914A, 126; *Atlantic Coast Line R. Co.* v. *Watkins,* 97 Fla. 350, 121 So. 95; *Germak* v. *Florida*

East Coast Ry. Co., 95 Fla. 991, 117 So. 391; *Florida East Coast Ry. Co.* v. *Nance*, 96 Fla. 171, 117 So. 842. There was evidence tending to prove that the deceased was negligent in failing to have his car under control as it approached the railroad crossing and to look out for an approaching train before going on or in dangerous proximity to the crossing; and that the appellee's agents in charge of the operation of its train were negligent in running it at a speed which was excessive and dangerous, where the railroad track crossed a much-travelled highway or street in a town, in not blowing the whistle or ringing the bell of the engine to give timely warning to inattentive persons travelling on the street or highway crossed, and in not having the engine so under control that the train could not be stopped before reaching the crossing. It is quite plain that the record does not show that absence of negligence chargeable against the appellee was proved by undisputed evidence. A state of facts which evidence tended to prove was such that appellant was entitled to recover, though the damages were subject to be diminished in proportion to contributory negligence of the deceased. It follows that the above-mentioned rule was erroneous. Because of that error, the judgment is reversed, and the cause is remanded, with direction that a new trial be granted."

Claughton v. *A. C. L. R. R. Co.*, 47 Fed. (2) 679, 680.

Respondent therefore submits that the action of the circuit court of appeals in reversing the cases involved in this petition, No. 95, and remanding them to the trial court to be submitted to a jury, should be affirmed.

Respectfully submitted,

DOYLE CAMPBELL,
WM. C. MCLEAN,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

Nos. 71 and 95.—October Term, 1933.

Sarah Elizabeth Stringfellow, Petitioner, 71 *vs.* Atlantic Coast Line Railroad Company. Atlantic Coast Line Railroad Company, Petitioner, 95 *vs.* Sarah Elizabeth Stringfellow, as Widow and Administratrix.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 4, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

Guy Stringfellow and two of his minor children who were riding with him in an automobile lost their lives as the result of a collision with a train of the Atlantic Coast Line Railroad at a right angled level crossing in Dunedin, Florida. His widow instituted five actions in the District Court for Southern Florida, one as widow to recover for the death of her husband; two as widow for the loss of the services of the deceased children; and two as administratrix of the children. The cases were consolidated for trial, and verdicts were directed for the defendant in all of them. Separate judgments were entered. Upon appeal the Circuit Court of Appeals affirmed the judgment in the action for the death of the husband, but reversed and remanded for new trials in the remaining cases.

There was conflicting testimony as to the speed of the train and the sounding of warnings of its approach, but verdicts were, nevertheless, directed because the trial judge thought the evidence permitted of no conclusion but that Stringfellow's negligence in driving up to and across the railroad tracks, with the approaching train in full view when he could have stopped and avoided the collision, was the sole proximate cause of the casual-

ties. A majority of the Circuit Court of Appeals, upon a reexamination of the evidence, concurred with the trial court so far as the husband's case was concerned, but found that in the actions brought on account of the children's deaths there was room for a finding by a jury that the negligence of the husband and that of the railroad's employees concurred in bringing about the disaster. The dissenting judge thought the train crew's negligence concurred with Stringfellow's in causing the collision, and therefore, all of the cases presented a question for the jury. The widow petitioned for the writ of certiorari in the action for the husband's death, and the company in the cases relating to the children; and the prayers of both were granted.

The applicable rules are not those of the common law (as to which compare *Miller* v. *Union Pacific Railroad Company*, decided this day) but are declared by the Compiled General Laws of Florida, which ar

"§ 7051. A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

"§ 7052. No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him."

Under decisions of the Supreme Court of Florida construing and applying these statutes, the railroad may overcome the presumption created by § 7051 and defeat recovery in all the actions by establishing that the injury was caused solely and proximately by the negligence of the husband. This was the unanimous holding of the Circuit Court of Appeals, and counsel do not dispute its accuracy. Applying this rule the majority said: "It is appellee's contention that the presumption of its negligence, which arose under that section [7051], upon proof of the injuries as alleged, was overcome by further proof which

disclosed that those injuries were caused solely by the negligence of the injured persons, and that the case presented is not one which calls for the application of the rule prescribed in Section 7052 for apportionment of damages, because no fault was attributable to it." And further: "A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching train. Notwithstanding Section 7052 he could not have recovered for an injury, and so recovery cannot be had on account of his death."

As respects the actions brought for the children's deaths, the majority held that the jury should have been allowed to decide whether the negligence of their father concurred with that of the railroad to bring about the injurious result.

On its face the opinion is inconsistent, for under the second clause of § 7052, if the husband's negligence were concurrent with that of the railroad's employees the plaintiff might recover although her damages would be diminished by reason of the concurring negligence of the decedent. In order to defeat her it must be found that his negligence was the sole proximate cause of his death. But if that be found, it is impossible to understand how the same negligence could be a concurring and proximate cause with the negligence of the train crew in bringing about the deaths of the children. And the converse is true; for if both concurrently participated in causing the accident, it is impossible to see how the negligence of either could be the sole proximate cause of the result.

Plainly one of the two holdings is erroneous; but it is not our province to examine the testimony and determine which is correct. This should be done below. The judgments are reversed and the cases remanded to the Circuit Court of Appeals with instructions to determine whether the evidence justified the direction of verdicts on the ground that the deceased husband's negligence was the sole proximate cause of the collision, or required a submission of that question, and the question of concurrent negligence to the jury; and to enter judgments accordingly.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.